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Paul J. Zech

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FEDERAL PRE-EMPTION AND STATE EXCLUSIVE REMEDY ISSUES IN EMPLOYMENT LITIGATION

PAUL J. ZECH*

I. INTRODUCTION

Volumes have been written in recent years on the complex and ever-expanding issue of the pre-emptive effect of various federal statutes on employment law claims.[1] This article is not intended to be an exhaustive or academic analysis of the issue of federal pre-emption, but rather a practical review of pre-emption and exclusive remedy concepts that can be of utility to the employment law practitioner, whether on behalf of plaintiff or defendant. Such a review cannot, of course, take the place of the deeper working knowledge with the issues that are inevitably required in a particular case, but may serve to avoid the immediate error in pleading or the inadvertent omission of a significant defense.

At the outset, it must be kept in mind that the concepts of pre-emption and exclusive remedy, while similar in some respects, are still fundamentally different. As discussed in more detail below, "pre-emption" applies to the usurpation of a particular field by Congressional action. It can apply to defeat both state and federal claims. The term "exclusive remedy," however, generally applies to a state statutory scheme which is intended to provide the sole recourse for a particular claimed injury. Both concepts must be examined by the practitioner in every employment-related case to determine whether the pleadings will state a viable cause of action, whether alternative forms of pleading can cause the petitioner's case to survive a motion to dismiss, and whether the defendant will have one or more defenses which will ultimately eliminate all or at least a portion of the plaintiff's case.

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* Shareholder, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis, Minnesota. J.D., William Mitchell College of Law (cum laude), 1984. Chairman, Minnesota State Bar Association, Labor & Employment Law Section, 1993-94. The author gratefully acknowledges the research assistance of Katherine A. Jones, J.D., University of Minnesota, 1996.

1. *See generally* Tod A. Cochran, Note, *The Golden State of Labor Preemption: The Circuit Courts Have Gone Too Far*, 44 HASTINGS L. REV. 131 (1992); Leta L. Fishman, Note, *Preemption Revisited: Title VII and State Tort Liability After International Union vs. Johnson Controls*, 66 ST. JOHN'S L. REV. 1047 (1993); Kevin J. McKeon, Comment, *NLRA Pre-emptions Put Simply: Livadas v. Bradshaw*, 33 DUQ. L. REV. 887 (1995); Eileen Silverstein, Note, *Against Pre-Emption and Labor Law*, 24 CONN. L. REV. 1 (1991); Edward C. Sweeney, Comment, *Dodging the Supremacy Clause: Do State Successor Statutes Survive Federal Labor Law Pre-emption?*, 13 INDUS. REL. L.J. 183 (1991).

II. FEDERAL PRE-EMPTION: A HISTORICAL OVERVIEW

In its purest form, the concept of pre-emption, particularly federal pre-emption, relates to the doctrine adopted by the United States Supreme Court holding that certain matters are of such a significant, national character that no state law can be constitutional if it is in conflict with a federal statute that was intended to occupy the entire field.

The pre-emption doctrine and its various permutations has its roots in the Supremacy Clause of the United States Constitution which simply states "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding."[2] The implications of the Supremacy Clause, particularly as it relates to enactments by both the federal and state branches of government, have been the subject of detailed analysis by the Supreme Court for well over 150 years.[3]

As the Supreme Court has continued to analyze and sharpen the concept of federal pre-emption, it is increasingly clear that there is no single route to the conclusion of whether a claim is pre-empted. Initially, it is clear that pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[4] Pre-emption *is not*, however, implicated by suits which are purely private in nature. Where litigation is purely between private parties and does not "touch the rights and duties of the United States," federal law will not govern.[5] To date, the Supreme Court has chosen to limit its pre-emption analysis to essentially three situations:

1. In the presence of a clear statutory prescription;[6]
2. A direct conflict between federal and state law;[7] and

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2. U.S. CONST. art. VI, cl. 2.

3. *See* Gibbons v. Ogden, 22 U.S. 1, 240 (1824) (Johnson, J., concurring) (finding New York State navigation laws which conflict with licenses granted by an act of Congress to be "repugnant to the said Constitution, and void").

4. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

5. Boyle v. United Technologies Corp., 487 U.S. 500, 506 (1987) (citing Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33 (1956)).

6. *See, e.g., Jones*, 430 U.S. at 525 (noting that where Congress has made it clear that it alone will regulate, state regulations in that area are prescribed); *see also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (discussing that where Congress intended to exclusively regulate, then state regulation is prescribed).

7. *See, e.g.,* Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963) (holding that federal law regulating marketing of avocados pre-empts California statute where compliance with both laws was impossible); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (holding that the Federal Alien Registration Act pre-empted state alien registration acts).

3. "Obligations to and rights of the United States under its contracts."[8]

In reference to the first category, therefore, absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred whenever the federal scheme created by Congress is so pervasive as to reasonably infer that Congress was usurping the field.[9] In the second category, where state law directly conflicts with the federal law, the Supreme Court holds that the state law is pre-empted because compliance with both the federal and state regulations is simply an impossibility.[10] And, in the third category where pre-emption is recognized, the court has expressed concerns over the validity of state action whenever "uniquely federal interests" are implicated such as the situation where the imposition of liability on government contractors may directly affect the terms of a government contract.[11]

Pre-emption of a state law is ordinarily found only reluctantly, however.[12] Especially in cases where, like the National Labor Relations Act (NLRA), no express pre-emption provision exists, courts will begin their analysis "with the basic assumption that Congress did not intend to displace state law."[13]

III. SIGNIFICANT FEDERAL PRE-EMPTION ISSUES

Understandably, it was not until after the passage of the Wagner Act and ensuing employment-related litigation that federal pre-emption issues in the labor law arena came to be addressed. The National Labor Relations Act was so far reaching in scope, and the Congressional intent to occupy the field so evident, that the issue of pre-emption was quickly before the federal judiciary. As discussed below, numerous other acts directly relating to employment have been the subject of pre-emption litigation as well.

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8. *See, e.g., Boyle*, 487 U.S. at 504 (stating "that obligations to and rights of the United States under its contracts are governed exclusively by federal law"); United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-94 (1973) (holding that where the United States was a party to a land transaction, the federal courts should determine the applicable law).

9. Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

10. *Florida Lime & Avocado Growers*, 373 U.S. at 142-43.

11. *Boyle*, 487 U.S. at 507.

12. Building & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 224 (1993) (holding the National Labor Relations Act does not pre-empt enforcement by a state authority acting as the owner of a construction project).

13. Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

A. NLRA PRE-EMPTION

Through passage of the National Labor Relations Act [hereinafter NLRA][14] in 1935, Congress assumed control over the broad and previously uncontrolled body of laws which now fall into the rubric of "labor law." Prior to this enactment, states had established a variety of statutory and common law schemes designed to address labor relations within their borders.

In any situation involving employment litigation, there exists the potential that the aggrieved employee may have rights protected by the NLRA, whether the employee worked in a unionized setting or not. The NLRA established a number of federally protected employee rights, summarized by Section 7 of the Act:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . . . [15]

In addressing the pre-emption issues presented by the NLRA, the Supreme Court has formulated key pre-emption theories. The first, referred to as *Garmon* pre-emption was articulated by the court in *San Diego Building Trades Council v. Garmon*.[16] *Garmon* pre-emption prohibits state regulation of activities that are protected by Section 7 of the NLRA or which constitute an unfair labor practice under Section 8.[17] *Garmon* pre-emption also forbids state regulation of activities that the NLRA arguably protects or prohibits.[18] Essentially, the *Garmon* pre-emption rule works to prevent conflict between state and local regulation and the integrated scheme of regulation established by the NLRA.

A second pre-emption principle, referred to as *Machinists* pre-emption emanates from *Machinists v. Wisconsin Employment Relations*

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14. 29 U.S.C. §§ 151-169 (1994).
15. *Id.* § 157.
16. 359 U.S. 236 (1959).
17. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).
18. Wisconsin Dep't of Indus. v. Gould, Inc., 475 U.S. 282, 286 (1986) (summarizing *Garmon*, 359 U.S. 236, and stating that "states may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits").

Commission.[19] Under *Machinists* pre-emption, the focus is on whether the state has attempted to regulate areas that Congress intended "to be controlled by the free play of economic forces."[20] Under this pre-emption principle, states are prohibited from attempting to regulate the economic weapons that are part and parcel of the collective bargaining process. Both employers and employees are deemed to have the right to resort to such economic weapons and the state "may not prohibit the use of such weapons or 'add to an employer's federal legal obligations in collective bargaining' any more than in the case of employees."[21]

Typically, NLRA pre-emption occurs when a plaintiff attempts to seek judicial relief for actions by an employer that arguably constitute or relate to an unfair labor practice under the Act. For example, as early as 1945, the Supreme Court held that a Florida law which attempted to place restrictions on who could qualify as a union business agent was pre-empted by the NLRA.[22] The Court determined that any such restriction unduly interfered with employees' rights under Section 7 of the Act to select their own representatives.[23]

In a subsequent Florida decision, the employee had sought unemployment compensation benefits and was deemed disqualified because she had filed an unfair labor practice charge with the National Labor Relations Board.[24] In *Nash v. Florida Industrial Commission*,[25] the Court held that the statute was unconstitutional as a violation of the supremacy clause, frustrating the enforcement of the NLRA.[26]

The First Circuit Court of Appeals has gone so far as to hold that the NLRA pre-empts discrimination claims under certain circumstances.[27] Specifically, in *Chaulk Services, Inc. v. Massachusetts Commission Against Discrimination*,[28] the court found that the Act expressly pre-empted a claim of discrimination based upon allegations of harassment concerning union activity despite plaintiff's claim that the harassment was actually gender-based.[29] Because the plaintiff's claims were fundamentally grounded on an assertion that her employer had illegally

19. 427 U.S. 132 (1976). *See* Golden State Transit Corp. v. City of L.A., 475 U.S. 608, 613 (1989) (involving application of the *Machinists* pre-emption principle).

20. Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 (1976) (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

21. *Id.* at 147.

22. Hill v. Florida, 325 U.S. 538, 542-43 (1945).

23. *Id.* at 544 (Stone, J., concurring).

24. Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967).

25. 389 U.S. 235 (1967).

26. Nash v. Florida Indus. Comm'n, 389 U.S. 235, 239-40 (1967).

27. Chaulk Servs., Inc. v. Massachusetts Comm'n Against Discrimination, 70 F.3d 1361 (1st Cir. 1995).

28. 70 F.3d 1361 (1st Cir. 1995).

29. *Chaulk*, 70 F.3d at 1366.

interfered with her protected union activity, the court held that a broad interpretation of the NLRA required the finding of pre-emption and abstention.[30]

Although an attempt at private enforcement of rights governed by the NLRA will ordinarily be met with a swift dismissal on pre-emption grounds, the Supreme Court has recognized several exceptions to the pre-emption doctrine. The *Garmon* Court itself acknowledged that the pre-emption doctrine will not be applied to activities that concerns interests "deeply rooted in local feeling."[31] Thus, cases involving actions such as mass picketing or threats of violence in the labor context will ordinarily not be deemed pre-empted by the NLRA.[32]

These exceptions were detailed by the Supreme Court in *Linn v. United Plant Guard Workers of America*,[33] where an employer official sued an employee, a union, and two of the union's officers, alleging that statements made in an organizing campaign were libelous per se.[34] The Court exempted such actions from NLRA pre-emption, noting that states need not yield jurisdiction to the federal government where the activity being regulated is merely of peripheral concern to the NLRA or otherwise touches upon local interests so deeply rooted that it cannot be assumed that Congress intended to deprive states of the power to act.[35]

B. LABOR MANAGEMENT RELATIONS ACT

Section 301 of the Labor Management Relations Act [hereinafter LMRA][36] provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[37]

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30. *Id.* at 1370-71.

31. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

32. *See generally* UAW-CIO v. Russell, 356 U.S. 634 (1958) (reiterating that NLRB does not have exclusive jurisdiction over common-law tort actions where conduct constitutes an unfair labor practice).

33. 383 U.S. 53 (1966).

34. Linn v. United Plant Guard Workers, 383 U.S. 53, 55-56 (1966).

35. *See* Minor v. Building & Constr. Trades Council, 75 N.W.2d 139, 141-42 (N.D. 1956) (involving a state court action to enjoin illegal picketing intended to force union recognition not pre-empted by the Labor Management Relations Act).

36. Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (1994).

37. *Id.*

On its face, the statute provides for federal jurisdiction over controversies involving collective bargaining agreements. However, the Supreme Court has also concluded that section 301 expresses a Congressional intent that the federal courts develop a federal common law to be applied in suits for enforcement of collective bargaining agreements.[38] When a suit stating a claim under section 301 is brought, state contract law is displaced, and the collective bargaining agreement is interpreted under this federal common law.[39] The purpose of pre-empting state contract law with a uniform federal law is simply to allow parties to collective bargaining agreements to have some certainty as to the way that the agreement will be construed by the courts. As summarized by the Supreme Court:

> Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches to that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract *or in a suit alleging liability and tort.* Any other result would elevate form over substance and allow parties to evade the requirements of [Section] 301 by relabeling their contract claims as claims for tortious breach of contract.[40]

The federal courts analyze this pre-emption question under the LMRA as requiring pre-emption when resolution of a state law claim of any nature is "substantially dependent upon" an analysis of the terms of an agreement made between the parties in a labor contract.[41] However, the Supreme Court has routinely confirmed that "not every dispute concerning employment, or tangentially involving a provision of the collective bargaining agreement is pre-empted by Section 301."[42] In *Lingle v. Norge Division of Magic Chef, Inc.*,[43] the Court held that section 301 did *not* pre-empt a state law tort claim for retaliatory discharge, even though the collective bargaining agreement governing the employment provided for arbitral adjudication of an employee's claim that she was fired without just cause.[44] As long as the state law could be resolved without interpreting the agreement itself, the claim was consid-

38. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 450-51 (1957).
39. Local 174, Int'l Bhd. of Teamsters v. Lucas Flower Co., 369 U.S. 95, 104 (1962).
40. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985) (emphasis added).
41. *Id.* at 220.
42. *Id.* at 211.
43. 486 U.S. 399 (1988).
44. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413 (1988).

ered to be "independent" of the agreement for purposes of analyzing section 301 pre-emption.[45]

Thus, section 301 pre-empts state law only insofar as resolution of the state law claim requires the interpretation of a collective bargaining agreement. The mere fact that the state law analysis may require the state court to focus on the same facts that would control resolution of an employee's contractual remedy is not enough to require pre-emption of the state law claim. If adjudication of the state law claim does not require a court to interpret any term of a collective bargaining agreement, then the state law claim is not pre-empted.

The LMRA's pre-emption impact is powerful, however, reaching as far as most employment-related tort claims.[46] Thus, claims against an employer for defamation and intentional infliction of emotional distress have been held pre-empted by the LMRA and the employee's failure to use the grievance procedures laid out in the collective bargaining agreement prevented him from pursuing any claims.[47] Similarly, claims for slander, intentional infliction of emotional distress, tortious interference with contractual relations, wrongful discharge, libel, and a spouse's claim for loss of consortium were all held to be pre-empted by the LMRA *except* to the extent that libel, malicious prosecution/false arrest, or loss of consortium claims did not necessitate consideration or interpretation of the collective bargaining agreement.[48]

Even an employee's claims of illegal promotion and training practices and retaliation under a race discrimination theory have been pre-empted by the LMRA. In *Reece v. Houston Lighting & Power Co.*,[49] the Fifth Circuit noted that the plaintiff's claims all turned upon the collective bargaining contract's provisions on promotion, seniority, and assignment to training programs. In defending against the employee's race discrimination claim, the court noted that the company would necessarily refer to the collective bargaining agreement's provisions as its legitimate, non-discriminatory reasons for the actions of which the plaintiff complained. In then responding to those articulated reasons, the plaintiff would necessarily need to attack them as pretextual, requiring a contractual interpretation. Thus, the employee's state law race discrimination claims were deemed pre-empted citing the Supreme Court's *Lingle* analysis.

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45. *Id.* at 410.

46. *See* Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1146 (9th Cir. 1988) (noting that § 301 is so powerful that it displaces entirely any state cause of action whose outcome would depend upon analysis of the collective bargaining agreement).

47. Bagby v. General Motors Corp., 976 F.2d 919, 921 (5th Cir. 1992).

48. Johnson v. Anheuser Busch, 876 F.2d 620, 623 (8th Cir. 1989).

49. 79 F.3d 485 (5th Cir. 1996).

The Indiana Court of Appeals recently examined the pre-emption provisions of the LMRA and held that the Act pre-empted claims of invasion of privacy and defamation relating to the employer's drug testing program.[50] Finding that the plaintiff's working conditions were governed by the collective bargaining agreement between her union and her employer, her claims were "inextricably intertwined with an analysis of the collective bargaining agreement" and were pre-empted by the LMRA.[51]

C. THE RAILWAY LABOR ACT

Similar to NLRA pre-emption is the pre-emption provided by the Railway Labor Act [hereinafter RLA].[52] The RLA applies, *inter alia*, to the employer-employee relationship arising in the railroad and airline industries. Because of the statutory scheme created for resolving disputes in transportation, however, the pre-emptive effect of the RLA is significantly broader than that of the NLRA or LMRA.

The RLA contemplates two distinct classes of controversy between employer and employee: major disputes which seek to create contractual rights, and minor disputes which are intended to enforce them.[53] In the event of a "major dispute" under the RLA, the Act requires the parties to undergo a lengthy process of bargaining and mediation, maintaining the status quo between them until the procedures are exhausted.

In contrast, the minor dispute category sets forth compulsory arbitration procedures for disputes arising or growing "out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."[54] Essentially, whenever an employer asserts a contractual right to take a contested action, the ensuing dispute is automatically deemed minor if the action is at least arguably justified by the terms of the collective bargaining agreement between the parties. Only if the employer's assertion is frivolous or obviously insubstantial does the dispute become declared major.[55]

Under this major/minor dichotomy established in the RLA, virtually any discharge action by an employer will be deemed minor so as to require the plaintiff to follow the grievance and arbitration procedures set forth in the RLA. Thus, where a plaintiff alleged "wrongful discharge" against a railroad for refusing to allow him to return to work

50. Jobes v. Tokheim Corp., 657 N.E.2d 145, 148-49 (Ind. Ct. App. 1995).
51. *Id.* at 148 .
52. 45 U.S.C. § 151 (1994).
53. Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711, 723 (1945).
54. 45 U.S.C. §§ 152(Sixth), § 153(First).
55. Consolidated Rail Corp. v. Railway Labor Executives Ass'n, 491 U.S. 299, 302-07 (1989).

following his recovery from an auto accident, his claim was dismissed on RLA pre-emption issues.[56] The Supreme Court held in that case that the only source of the plaintiff's right not to be discharged and the only basis upon which plaintiff could claim that his discharge was "wrongful" was the collective bargaining agreement between the employer and the union.[57] His claim was therefore deemed subject to the RLA's requirement that it be submitted to the National Adjustment Board for adjustment, leaving plaintiff with no judicial relief in state or federal court.[58]

Even state handicap discrimination provisions have been held pre-empted by the RLA under certain conditions.[59] In *O'Brien v. Consolidated Railway Corp.*,[60] the plaintiff contended that he had been discriminated against on the basis of his disability by the defendant's denial of a job opportunity to him.[61] Plaintiff was ultimately dismissed from his position and then filed a state court action alleging disability discrimination under the Massachusetts Human Rights Act.[62] The railroad petitioned to remove the case to federal court and then moved for summary judgment on pre-emption grounds.[63] Distinguishing the RLA's pre-emption provisions from the case law denying pre-emption of Human Rights Act claims under the LMRA, the First Circuit concluded that the collective bargaining agreement needed to be interpreted in order to establish the legitimacy of the plaintiff's claims and the employer's defenses.[64] Explaining its rationale, the court stated:

> More fundamentally, addressing the merits of [plaintiff's] claim of physical handicap discrimination would require us to assess [his] fitness and ability to perform safely the functions of a stevedore. Yet an employee's fitness and ability are governed by the rules and procedures contained in the collective bargaining agreement. . . . [The anti-discrimination statute] requires a court to determine whether the plaintiff is a "qualified handicapped person," but this determination would be impossible to make without reference to the collective bargaining agreement.[65]

56. Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 321 (1972).
57. *Id.* at 326.
58. *Id.* at 324.
59. O'Brien v. Consolidated Ry. Corp., 972 F.2d 1 (1st Cir. 1992).
60. 972 F.2d 1 (1st Cir. 1992).
61. O'Brien v. Consolidated Ry. Corp., 972 F.2d 1, 2 (1st Cir. 1992).
62. *Id.*
63. *Id.*
64. *Id.* at 4-5.
65. *Id.* at 5.

The court went on to distinguish such handicap discrimination provisions from race discrimination rulings in which it has been determined that the RLA does not pre-empt state actions for racial discrimination.[66] "Resolution of the question of whether an employer was engaged in racial discrimination could not require interpretation of the collective bargaining agreement."[67]

Even when an employee covered by the RLA is appropriately seeking relief through the Federal Employers Liability Act [FELA], the employee's claim may wind up being pre-empted by the RLA. For example, where an injured railway worker brought an action against a railroad to recover work-related compensatory damages for an on-the-job injury, his claim that he was discharged in retaliation for filing the FELA claim became a "minor dispute" that was then pre-empted by the RLA.[68]

Although broad in its application, RLA pre-emption is not without its limits. If the nature of the employee's claim rises to a level of being a "major dispute" the pre-emptive effect of the RLA will not apply. Thus, where an employee claimed wrongful discharge based on his unionizing activity, his claim was deemed not to be a "minor dispute" within the exclusive jurisdiction of the arbitral board under the RLA and the employee was entitled to pursue his state court cause of action against the employer.[69]

Because the pre-emptive effect of the RLA is so sweeping, counsel representing an employee who is arguably covered by the Act must carefully consider not only the pre-emption issues, but also the need for timely filing for adjustment under the statute. Submission to the National Railroad Adjustment Board requires strict adherence to the timing provisions established by the collective bargaining agreement. Failure to adhere to the prescribed time limits can result in dismissal with no judicial recourse.[70]

Even claims arising from conduct occurring *prior* to the commencement of any formal employment relationship may be covered by the pre-emptive force of the RLA. Thus, where a plaintiff's claims were

66. *O'Brien*, 972 F.2d at 5-6.

67. *Id.* at 6 (citing Colorado Anti-Discrimination Comm'n v. Continental Airlines, 372 U.S. 714, 724 (1963); McCall v. Chesapeake & Ohio Ry. Co., 844 F.2d 294, 302 (6th Cir. 1988)). *See also* Bowe v. Northwest Airlines, 974 F.2d 101, 103 (8th Cir. 1992) (holding that former airline employee seeking disability benefits under collective bargaining agreement states minor dispute under RLA which must be pursued through statutory scheme; also, no ERISA pre-emption of mandatory arbitration of such minor disputes is applicable).

68. Jackson v. Consolidated Rail Corp., 717 F.2d 1045, 1049-51 (7th Cir.), *cert. denied*, 465 U.S. 1007 (1984).

69. Davies v. American Airlines, 971 F.2d 463, 468 (10th Cir. 1992).

70. Union Pacific R.R. v. Sheehan, 439 U.S. 89, 95 (1978).

premised on misrepresentations made *prior* to her hire, the RLA still pre-empted any state court cause of action sounding in tort as her claim would require an interpretation of the collective bargaining agreement.[71]

D. EMPLOYEE RETIREMENT INCOME SECURITY ACT

In 1974 Congress enacted the Employee Retirement Income Security Act [hereinafter ERISA],[72] a comprehensive statutory scheme designed to govern health care and other benefits provided by employers to their employees. That Act included a broad and explicit pre-emption clause covering any state law claim that "relates to" an ERISA employee benefit plan.[73]

Counsel presented with actual or contemplated employment-related litigation should consider the fact that ERISA pre-emption has been characterized as among the broadest ever enacted by Congress.[74] ERISA has been interpreted as intended to pre-empt even generally applicable laws enacted by a state, not simply laws aimed exclusively at employee benefit plans.[75]

The Ninth Circuit Court of Appeals has succinctly described the proper analysis to be undertaken in considering ERISA pre-emption:

> The key to distinguishing what ERISA pre-empts and what it does not lies, we believe, in recognizing that the statute comprehensively regulates certain *relationships*: for instance, the relationship between plan and plan member, between plan and employer, between employer and employee (to the extent an employee benefit plan is involved), and between plan and trustee. Because of ERISA's explicit language, and because state laws regulating these relationships (or the obligations flowing from these relationships) are particularly likely to interfere with ERISA's scheme, these laws are presumptively pre-empted.[76]

Despite its broad construction of the pre-emption visions of ERISA, the United States Supreme Court has recognized that there are limits to

71. Melanson v. United Airlines, 931 F.2d 558, 562 (9th Cir. 1991). *But see* Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234, 1236 (4th Cir. 1984) (finding that an applicant for employment is not an "employee" under the Railway Labor Act).

72. 29 U.S.C. §§ 1001-1144 (1994).

73. *Id.* § 1144.

74. PM Group Life Ins. Co. v. Western Growers Assurance Trust, 953 F.2d 543, 545 (9th Cir. 1992).

75. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-48 (1987).

76. General Am. Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1521 (9th Cir. 1993) (citing J. Daniel Plants, Note, *Employer Recapture of ERISA Contributions Made by Mistake*, 89 MICH. L. REV. 2000, 2017 (1991); *PM Group Life Ins.*, 953 F.2d at 545).

that pre-emption and that ERISA does not necessarily pre-empt either a generally applicable state statute that "might burden the administration of a plan" or "that makes no reference to or functions irrespective of, the existence of an ERISA plan."[77] The Court has also indicated that certain "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."[78] Finally, the Court presumes Congress did not intend to pre-empt areas of traditional state regulation when it enacted ERISA.[79]

Essentially, courts have condensed the above principles and have categorized ERISA pre-emption along the following lines:

1. Laws that regulate the types of benefits or terms of ERISA plans;
2. Laws that require reporting, disclosure, funding, or vesting requirements for ERISA plans;
3. Laws that provide rules for the calculation of benefits to be paid under ERISA plans; and
4. Laws that provide remedies for misconduct growing out of the administration of ERISA plans.[80]

In its application, ERISA can pre-empt even those claims which appear at first blush to be only indirectly related to ERISA. In *Tingey v. Pixley-Richards West, Inc.*,[81] the Ninth Circuit was presented with a ten-count state court common law complaint that had been removed by the defendant from Arizona State Court to the federal system.[82] The counts asserted "garden variety" employment claims, including breach of contract, breach of a covenant of good faith and fair dealing, tortious breach, intentional infliction of emotional distress, insurance bad faith, violation of Arizona statutes pertaining to insurance, intentional interference with contract, and denial of prospective benefits.[83] Guided by the Supreme Court decision in *Ingersoll-Rand Co. v. McClendon*,[84] the *Tingey* court held that "ERISA's powerful preemption transformed all

77. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990).

78. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 (1983).

79. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985).

80. McLean v. Carlson Cos., 777 F. Supp. 1480, 1483 (D. Minn. 1991) (citing Felton v. Unisource Corp., 739 F. Supp. 1388, 1390 (D. Ariz. 1990), *aff'd and rev'd in part*, 940 F.2d 503 (9th Cir. 1991)).

81. 953 F.2d 1124 (9th Cir. 1992).

82. Tingey v. Pixley-Richard West, Inc., 953 F.2d 1124, 1128-29 (9th Cir. 1992). The "well-pleaded complaint rule," which ordinarily prevents a defendant from removing a state court action to federal court unless the complaint raises a federal question on its face, does not apply to complaints where the substance of the claims simply "relate" to an ERISA plan. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987).

83. *Tingey*, 953 F.2d at 1128-29.

84. 498 U.S. 133 (1990).

ten of the Tingeys' claims into federal claims. . . . The Tingeys' sole remedy exists in federal court under ERISA."[85]

A similarly stern result was reached in *Sanson v. General Motors Corp.*[86] There, the gravamen of plaintiff's complaint was that he had been defrauded into taking early retirement by the knowing misrepresentations of his employer.[87] Plaintiff claimed that his action was solely one for common law fraud and that his dispute did not truly "relate to" the employer's pension plan, but rather to the employer's misrepresentations.[88]

The Eleventh Circuit rejected plaintiff's theory, holding that the misrepresentation plaintiff relied upon related to retirement benefits available, and that the measure of damages would be the amount of benefits plaintiff would have received under the retirement plan.[89] "Such a determination of damages demonstrates the relationship between the lawsuit and the special retirement plan."[90] Plaintiff's claims, therefore, were pre-empted by ERISA and barred.[91] Even non-traditional ERISA plans can result in ERISA pre-emption. In *Moeller v. Bertrang*,[92] an employee brought an action against his former employer seeking to recover retirement benefits based solely on the employer's oral promise to his employees that such benefits would be payable.[93] There, the federal court stated that the highly specific nature of the promises the employer had made to the employee, in conjunction with non-gratuitous payments to another employee under similar circumstances was sufficient to constitute a "plan" under ERISA.[94] Thus, the employee's common law contract claim seeking retirement benefits was deemed to be pre-empted by ERISA.[95]

A state's "whistleblower" statute can be found to be pre-empted under ERISA when the nature of the whistleblowing "relates to" an employee benefit plan. Thus, where an individual employee's whistleblowing claim refers to an ERISA plan and, in fact, depends on its very

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85. *Tingey*, 953 F.2d at 1131.
86. 966 F.2d 618 (11th Cir. 1992).
87. Sanson v. General Motors Corp., 966 F.2d 618, 619 (11th Cir. 1992).
88. *Id.* at 620.
89. *Id.* at 621.
90. *Id.*
91. *Id. See also* Kelso v. General Am. Life Ins. Co., 967 F.2d 388, 391 (10th Cir. 1992) (determining that misrepresentation claims regarding eligibility for insurance coverage are pre-empted under ERISA).
92. 801 F. Supp. 291 (D.S.D. 1992).
93. Moeller v. Bertrang, 801 F. Supp. 291, 292-93 (D.S.D. 1992).
94. *Id.* at 296.
95. *Id.* at 298.

existence, the whistleblowing claim and the state statute under which it is pled is deemed pre-empted by ERISA.[96]

State anti-discrimination laws, however, are generally *not* deemed to be pre-empted by ERISA.[97] Although ERISA does not completely pre-empt a state human rights act provision on employment discrimination, if a plaintiff contends that the motivating factor behind a termination was the employer's attempt to avoid benefit payments, pre-emption is clear, irrespective of the statute under which plaintiff may be attempting to proceed.[98] Thus, where an employee attempts to characterize a claim as disability discrimination when in fact the allegation is actually one for termination motivated by a desire to avoid paying long-term disability benefits, the claim asserted is actually based on the existence of a benefit plan and is pre-empted by ERISA.[99]

In summary, virtually any employment-related claim, whether based on statute or state common law, that relates to, refers to, or appears to depend upon an alleged ERISA plan must be carefully scrutinized for the potential pre-emptive effect of ERISA.

E. MISCELLANEOUS FEDERAL STATUTES

In addition to the broader and better established statutory pre-emption theories outlined above, there are also numerous other federal statutes and regulatory schemes which, from time to time, have been alleged to provide a pre-emption defense to defendants against state causes of action in the employment law context. Generally speaking, such pre-emption claims have failed but some narrow exceptions to that general rule do exist.

1. Fair Labor Standards Act

The Fair Labor Standards Act of 1938 [hereinafter FLSA][100] was passed by Congress to establish a baseline for minimum compensation[101] and required the payment of additional compensation for overtime work in most industries.[102] While the FLSA does not contain the kind of specific pre-emption language in other federal statutes, there remain

96. McLean v. Carlson Cos., 777 F. Supp. 1480, 1483 (D. Minn. 1991).

97. *See* Minnesota Mining & Mfg. Co. v. State, 289 N.W.2d 396, 400-401 (Minn. 1979) (determining that provision of Minnesota Human Rights Act prohibiting discrimination in employment on basis of sex, including discrimination on the basis of pregnancy-related disabilities, is not pre-empted by ERISA, following majority rule).

98. Alwin v. Sprint Communications Co., 870 F. Supp. 275, 277 (D. Minn. 1994).

99. *Id.*

100. 29 U.S.C. §§ 201-219 (1994).

101. *Id.* § 206.

102. *Id.* § 207.

circumstances where it can pre-empt certain state court causes of action. In the context of a "wrongful discharge" claim brought under the public policy theory, for example, the FLSA pre-emption issue has been held to be viable.[103] In *Tate v. Pepsi-Cola Metropolitan Bottling Co.*,[104] the plaintiff claimed to have been discharged for refusing to work overtime without pay.[105] He alleged that discharging him for that reason violated the public policy embodied by the FLSA, and asserted a wrongful discharge tort claim against his former employer.[106] His state court public policy discharge claim was deemed pre-empted and the case was dismissed on the basis that the FLSA provided its own enforcement remedies which plaintiff had not followed.[107] The Seventh Circuit Court of Appeals affirmed dismissal.[108]

2. *Bankruptcy Code*

The Federal Bankruptcy Code[109] prohibits termination of employment because an employee has filed for bankruptcy.[110] In contrast to the pre-emption conclusions reached under similar language in other statutes, this provision of the Code has been held not to pre-empt a state court common law action for wrongful termination.[111] In *Wenners v. Great State Beverages*,[112] the court held that "[w]hile a plaintiff may not pursue a common law remedy where the legislature intended to replace it with a statutory cause of action, here, there has been no clear statutory intent to supplant the common law cause of action."[113] Specifically, the New Hampshire Supreme Court noted that the Bankruptcy Code itself provides no actual remedy for violation by a private employer, "nor does it set forth [any] procedures or refer to any other section of the Code."[114] Therefore, the court held that it could not be determined that

103. Tate v. Pepsi-Cola Metropolitan Bottling Co., 32 Empl. Prac. Dec. (CCH) ¶ 33,951 (E.D. Wis. 1983).

104. 32 Empl. Prac. Dec. (CCH) ¶ 33,951 (E.D. Wis. 1983).

105. Tate v. Pepsi-Cola Metro. Bottling Co., 32 Empl. Prac. Dec. (CCH) ¶ 33,951 (E.D. Wis. 1983).

106. *Id.*

107. *Id. See generally* Michael D. Moberly, *Fair Labor Standards Act Preemption of "Public Policy" Wrongful Discharge Claims*, 42 DRAKE L. REV. 525 (1993) (discussing whether FLSA pre-empts common-law wrongful discharge claim); Michael D. Moberly, *Fair Labor Standards Act Preemption of State Wage Payment Remedies*, 23 ARIZ. ST. L.J. 991 (1991) (discussing whether FLSA pre-empts state statutory remedy for employee due to an employer's failure to pay wages).

108. 742 F.2d 1459 (7th Cir. 1984).

109. Bankruptcy Reform Act of 1978, Pub. L. 95-598, 1978 U.S.C.C.A.N. (92 Stat.) 2549.

110. 11 U.S.C. § 525(b) (1994).

111. Wenners v. Great State Beverages, 663 A.2d 623, 626 (N.H. 1995).

112. 663 A.2d 623 (N.H. 1995).

113. Wenners v. Great State Beverages, 663 A.2d 623, 625 (N.H. 1995).

114. *Id.* (citations omitted).

Congress intended to usurp the field and supplant any common law causes of action for wrongful termination that may have existed.[115]

3. Energy Reorganization Act

Various lesser established statutes pertaining to government-related industries continue to raise questions of potential federal pre-emption. Such pre-emption was raised as a defense in *English v. General Electric Co.*,[116] but was ultimately rejected by the court.[117] There, the employee was a laboratory technician at a nuclear facility operated by General Electric.[118] Plaintiff contended that she had complained about nuclear safety standards and was ultimately discharged.[119] Plaintiff filed a complaint with the Secretary of Labor regarding the Energy Reorganization Act of 1974,[120] which made it unlawful for an employer in the nuclear industry to discharge any employee or otherwise discriminate against such employee because of complaints pertaining to the industry.[121] Employees subsequently filed suit against General Electric seeking compensatory and punitive damages under a state law theory of intentional infliction of emotional distress.[122]

The Supreme Court analyzed the question as to whether plaintiff's claims were barred by federal pre-emption under the Energy Reorganization Act and determined that they were not.[123] Plaintiff's claims were deemed not to conflict with particular aspects of the Act[124] and there were insufficient indicators of Congressional intent upon which to rest a pre-emption finding.[125]

4. Atomic Energy Act

In a case of public note, a similar pre-emption analysis was required in *Silkwood v. Kerr-McGee Corp.*[126] Again, the question of federal pre-emption of state claims against an employer under the Atomic Energy

115. *Id.*
116. 496 U.S. 72, 78 (1990).
117. English v. General Elec. Co., 496 U.S. 72, 78 (1990).
118. *Id.* at 74.
119. *Id.*
120. 42 U.S.C. § 5851(a) (1994).
121. *English*, 496 U.S. at 75-76.
122. *Id.* at 77.
123. *Id.* at 78-90.
124. *Id.* at 90.
125. *Id.* at 86. *See also* Masters v. Daniel Int'l Corp., 917 F.2d 455, 456 (10th Cir. 1990).
126. 464 U.S. 238 (1984).

Act of 1954[127] were rejected.[128] In reviewing the statute and analyzing its potential pre-emptive effect, the Supreme Court held that the Atomic Energy Act was devoid of "adequate remedy" to those injured by exposure to hazardous materials.[129] Accordingly, there were insufficient grounds for determining such state claims to be pre-empted.[130]

F. CONCLUSION

In conclusion, practitioners on both sides of employment cases must contemplate the possibility of federal pre-emption of some or all theories in such cases. The nature of the claims and the industry in which the employee works must both be carefully analyzed to assess whether some federal legislative scheme may provide a pre-emptive right to the employee, thereby barring a state cause of action.

IV. STATE EXCLUSIVE REMEDY PROVISIONS

A. INTRODUCTION

Separate and apart from the issue of federal pre-emption is the matter of exclusive remedy claims preclusion. State legislatures have increasingly passed employment-related statutes that not only provide rights and remedies for employees, but sometimes remove rights and remedies as well. Workers' compensation statutes and employment discrimination legislation have both proved to be particularly important areas of development in recent judicial decisions.

B. WORKERS' COMPENSATION

Perhaps the most commonly asserted statutory basis for a defense that a plaintiff's cause of action is barred by an exclusive remedy provision is workers' compensation. As a quid pro quo for the passage of these statutes providing strict liability for work-related injuries, the various state legislatures most often included a provision making the workers' compensation statutory scheme an employee's sole remedy for such injuries.[131] Recent developments regarding workers' compensation

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127. 42 U.S.C. §§ 2011-2160 (1994).

128. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255-56 (1984).

129. *Id.* at 256-258.

130. *Id.* at 256.

131. *See, e.g.*, N.D. CENT.CODE §§ 65-01-01, 65-05-06 (1995); S.D. CODIFIED LAWS ANN. § 62-8-6 (1995); MINN. STAT. ANN. § 176.031 (West 1994).

exclusivity in the burgeoning area of employment-related litigation have significantly broadened the potential defense.

The impact and scope of the exclusive remedy provisions of the workers' compensation statutes were never more dramatically presented than in the Minnesota Supreme Court's recent decision in *McGowan v. Our Savior's Lutheran Church*.[132] There, the plaintiff was a church employee who was raped while working as the director of a homeless shelter the church operated.[133] Prior to initiating a lawsuit against her employer, the plaintiff applied for, received and accepted workers' compensation benefits for the physical injuries she sustained as a result of being raped.[134] She then commenced suit against the church, asserting a claim for negligence.[135] The church moved for summary judgment on the merits and on jurisdictional grounds, claiming that the Minnesota Workers' Compensation exclusive remedy provision provided the plaintiff's exclusive remedy and that state district courts had no jurisdiction over the dispute.[136] Plaintiff, on the other hand, contended that the Act's "assault exception"[137] removed her claims from the exclusive remedy provisions of the statute because her injuries were not, by definition, a "personal injury."[138] Plaintiff contended that she was assaulted for personal reasons, permitting the application of the assault exception.[139]

Rejecting the plaintiff's theory, the Minnesota Supreme Court held that the plaintiff's injuries resulted solely from her activities as an employee and

> that [her] employment was a causal factor contributing to her being raped. At the time she was raped, [plaintiff] was the shelter's director and had never had any contact with her assailant outside the workplace. Further, the assault occurred during working hours, in her office, while she was directly engaged in the performance of her work duties. Based on these facts, we cannot say that the rape arose from circumstances unrelated to [plaintiff's] employment.[140]

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132. 527 N.W.2d 830 (Minn. 1995).

133. McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830, 831-32 (Minn. 1995).

134. *Id.* at 831 n.1.

135. *Id.* at 831.

136. *Id.*

137. *Id.* The Minnesota Workers' Compensation Act excludes from its provisions injuries "caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment." MINN. STAT. ANN. § 176.011(16) (West Supp. 1996).

138. *McGowan*, 527 N.W.2d at 831 & n.2.

139. *Id.* at 831.

140. *Id.* at 834.

One formula for analyzing compensation cases arising from such personal assaults is referred to, in Minnesota at least, as the "three group" method articulated by the Minnesota Supreme Court in *Hansen v. Robitshek-Schneider Co.*[141] There, the supreme court identified three groups of compensation cases arising from assault: (1) non-compensable cases in which the assailant is motivated by personal animosity toward the victims; (2) compensable cases in which the provocation or motivation arises solely from work activities; and (3) cases that are usually compensable in which the assault is neither personal nor related to the employment.[142] This method has been used in numerous Minnesota cases, resulting in mixed conclusions as to compensability and exclusive remedy application.[143]

In North Dakota, although not heavily litigated, the state's workers' compensation exclusive remedy provision has been deemed to apply even to a spouse's claim for loss of consortium relating to her husband's work-related injury. In *Wald v. City of Grafton*,[144] the plaintiff brought a direct claim against her deceased husband's employer claiming loss of consortium following his serious injury in an accident while he was working as an employee of the city.[145] The spouse had applied for and received workers' compensation benefits.[146] "The sole issue on appeal was whether the exclusive remedy provisions of the workers' compensation statute in North Dakota would serve to bar the plaintiff's cause of action for loss of consortium."[147] Holding that the North Dakota statutory provision was sufficiently broad to encompass both workers and their families and dependents, the court concluded that there was no basis for deviating from the strong policy considerations behind the exclusive remedy provisions of the Act and denied recovery.[148]

A statutory workers' compensation exclusive remedy provision can operate to bar not only common law causes of action in employment litigation, such as some work-related assaults, but can even serve to "trump" other statutory schemes intended to protect employee rights.

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141. 297 N.W. 19, 21-22 (Minn. 1941).

142. Hansen v. Robitshek-Scheider Co., 297 N.W. 19, 22 (Minn. 1941).

143. *See* Foley v. Honeywell, Inc., 488 N.W.2d 268, 273 (Minn. 1992) (finding assault exception inapplicable and concluding that random sexual attack on employee is, as a matter of law, not intended to injure the employee for personal reasons); Bear v. Honeywell, Inc., 468 N.W.2d 546, 547-48 (Minn. 1991) (applying the "three group" test to hold that the plaintiff's assault was in category three and, thus, covered by the Act and that plaintiff could not bring any separate claim against her employer as a result).

144. 442 N.W.2d 910 (N.D. 1989).

145. Wald v. City of Grafton, 442 N.W.2d 910, 910-11 (N.D. 1989).

146. *Id.* at 910.

147. *Id.* at 911.

148. *Id.* at 912.

In *Karst v. F.C. Hayer Co.*,[149] the issue presented to the Minnesota Supreme Court was whether the exclusive remedy provision of the Workers' Compensation Act precluded a discrimination action brought by a disabled worker against his former employer under the Minnesota Human Rights Act.[150] The plaintiff had become disabled as a result of work-related injuries and when his former employer refused to rehire him, he claimed that it was discrimination due to his disability. The supreme court posed the issue presented as whether "the Minnesota Workers' Compensation Act provides a remedy for disability discrimination."[151] The Court ultimately determined that the injury sustained by the plaintiff as the result of his former employer's refusal to rehire him was an injury for which compensation was available under the Workers' Compensation Act. That is, the Workers' Compensation Act provided the plaintiff with additional benefits due to the company's refusal to rehire him. Thus, the plaintiff was not entitled to proceed separately against the employer for disability discrimination.[152]

In summary, whenever a plaintiff brings suit against an employer seeking a remedy for injuries (whether physical or mental in nature) serious consideration must be given to the Workers' Compensation Act exclusive remedy provision. Even in cases where the workers' compensation system seemingly should not apply, the affirmative defense can be raised. Moreover, the exclusive remedy defense raises the fundamental question of the district court's jurisdiction even to hear such a dispute. Thus, a denial of a motion to dismiss on exclusive remedy grounds may be immediately appealable.[153]

C. HUMAN RIGHTS ACT

Like workers' compensation statutes, the anti-discrimination acts passed by state legislatures also frequently contain express or implied exclusive remedy provisions. Depending upon such clauses and the common law claims being pursued, the Human Rights Act can either preclude such a common law action or at least limit it.

For example, in *Wirig v. Kinney Shoe Corp.*,[154] the Minnesota Supreme Court was confronted with the question as to whether a common law claim for battery could be brought as a parallel action to lay

149. 447 N.W.2d 180 (Minn. 1989).
150. Karst v. F.C. Hayer Co., 447 N.W.2d 180, 181 (Minn. 1989).
151. *Id.* at 184.
152. *See also* Schachter v. Dep't of Indus., Labor & Human Relations, 422 N.W.2d 906, 909-910 (Wis. Ct. App. 1988) (finding that workers' compensation law precluded a handicap discrimination act based upon the same claimed injury).
153. *See* McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830, 833 (Minn. 1995).
154. 461 N.W.2d 374 (Minn. 1990).

claim for sexual harassment under the Human Rights Act, when the battery was the same act leading to the unlawful touching under the sexual harassment claim.[155] The Court emphasized that a Minnesota Human Rights act required a broad construction to effectuate its purposes.[156] In the absence of an express abrogation in the Human Rights Act of a common law claim for battery, it was determined that parallel actions for battery and sexual harassment under the Human Rights Act could be maintained.

Nevertheless, the Court did not uphold any claim for double recovery for the same harm. "What we have here are two legal remedies for the same wrongful conduct. Much like a products liability case where plaintiff pursues both a warranty and a negligence action, here plaintiff may pursue either or both sexual harassment or battery, provided, however, there is no double recovery."[157]

At least in Minnesota, then, a plaintiff pursuing such parallel actions will at some point in the proceedings be required to select a remedy, although there appears to be no mandate that such selection occur prior to a verdict.

Since the North Dakota Human Rights Act contains no express abrogation of any common law cause of action for battery, the same analysis could be applied should a plaintiff seek to bring parallel causes of action for battery and sexual harassment under the Human Rights Act.

Still to be refined is the issue of whether a separate tort or statutory basis exists for an employee who claims to have been the victim of retaliation for asserting a Human Rights Act claim. Like most state laws prohibiting employment discrimination, the North Dakota Human Rights Act makes it a discriminatory practice to "threaten or engage in reprisal" against a person who has asserted rights under the Act.[158] Similar language in Minnesota's Human Rights Act has led at least one district court to conclude that this statutory provision prohibits an employee from pursuing a parallel state action for whistleblowing under Minnesota Whistleblower Statute.[159]

In *Williams v. St. Paul Ramsey Medical Center, Inc.*,[160] the plaintiff alleged that her employer retaliated against her for complaining about sexual harassment and that this retaliation gave rise to claims under the

155. Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 379 (Minn. 1990).

156. *Id.* at 378.

157. *Id.* at 379.

158. N.D. CENT. CODE § 14-02.4-18 (1995).

159. Williams v. St. Paul Ramsey Medical Ctr., 530 N.W.2d 852, 857 (Minn. Ct. App. 1995) (concluding that the dismissal of the whistleblower claim by the district court was in error).

160. 530 N.W.2d 852 (Minn. Ct. App. 1995).

reprisal provisions of the Minnesota Human Rights Act[161] and Minnesota Whistleblower's Statute.[162] The district court held that plaintiff's claims for the alleged reprisal were limited to the Human Rights Act, noting that statute's exclusive remedy language: "The procedure herein provided shall, while pending, be exclusive."[163] The court of appeals, however, disagreed.[164] Concluding that the Minnesota Human Rights Act and Whistleblower Statutes needed to be harmonized if at all possible, the court found that the Whistleblower Statute's remedies were "in addition to any remedies otherwise provided by law" and that both statutory claims could be pursued simultaneously.[165]

In contrast to the issues presented in *Williams*, the North Dakota Whistleblower Statute is less detailed than Minnesota's, contains no specific remedies provision, and does not appear to provide a private cause of action.[166] Furthermore, the North Dakota Human Rights Act does not contain the exclusivity language presented in the Minnesota Human Rights Act.[167] Thus, only through judicial proceedings will it become clear whether simultaneous reprisal actions can be maintained under North Dakota law, or whether the Human Rights Act will serve as a plaintiff's sole remedy.

V. CONCLUSION

As legislatures continue to pass and refine employment rights legislation, more attention needs to be paid to the issues of pre-emption and exclusive remedy. When Congress passes sweeping new legislation (such as the Americans with Disabilities Act and the Family and Medical Leave Act) lawmakers should more clearly express their intent as to issues that pertain to pre-emption and whether Congress is intending to occupy the entire field. At the state level, legislation that provides new rights and remedies or which codifies existing common law rights should be crafted to address potential conflicts with other employment statutes and claims. Significant rights and defenses relating to employment should not be left to succeed or fail based on needless judicial harmonizing of statutes which could have been avoided merely by proper drafting and review of the policy considerations behind the legislation.

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161. MINN. STAT. ANN. § 363.03(7) (West 1995).
162. *Id.* § 181.932-937.
163. *Id.* § 363.11; *Williams*, 530 N.W.2d at 855.
164. *Williams*, 530 N.W.2d at 855-56.
165. *Id.* at 856-57.
166. N.D. CENT. CODE § 34-06-18 (1987).
167. *Cf.* MINN. STAT. ANN. § 363.11 (stating that the procedures provided in the section are exclusive while pending).