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Labor Law - Federal Preemption - Pension and Retirement Plans

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Recent Decisions

LABOR LAW—FEDERAL PREEMPTION—PENSION AND RETIREMENT PLANS—The Supreme Court of the United States has held that prior to ERISA, a state's power to regulate pension plans by imposing minimum vesting and funding requirements more stringent than those contained in a collective bargaining agreement was not preempted by federal labor policy.

Malone v. White Motor Corporation, 435 U.S. 497 (1978).

Plaintiff, White Motor Corporation (White Motor), owned and operated two farm equipment manufacturing plants in Hopkins and Minneapolis, Minnesota.[1] The employees at these plants were covered by a pension plan that was the product of negotiations between White Motor and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), the employees' representative.[2] The 1971 version of the plan provided that no employee had any vested right to benefits prior to retirement and that pension benefits were payable out of plan funds only.[3] During the 1968 and 1971 contract negotiations, White Motor executed pension guarantees, which provided that upon termination of the pension plan, benefits were guaranteed by the company at a designated level. By giving the guarantees, White Motor assumed a direct liability of approximately $7 million.[4]

Because of substantial losses incurred at the plants, White Motor closed its Minneapolis plant in June, 1972.[5] White Motor attempted to terminate the pension plan on June 30, 1972,[6] but the UAW

1. White Motor Corp. v. Malone, 412 F. Supp. 372, 373 (D. Minn.), *rev'd,* 545 F.2d 599 (8th Cir. 1976), *rev'd,* 435 U.S. 497 (1978).

2. The employees had been represented by the UAW since 1955. *Id.* at 373-74.

3. The plan also provided for deferred funding of past service liability (the excess of the accrued liability of the pension fund over the present value of the assets of the fund) by amortizing it over a period of thirty-five years. This unpaid service liability was to be met through contributions by the employer from its continuous operations. Thus, when the plan was terminated, the pension fund could not increase, and some past service liability remained unfunded. *Id.* at 373-74.

4. *Id.* at 374.

5. At the time the Minneapolis plant was closed, the past service liability of the pension plan was $14 million. *Id.* at 375.

6. Section 10.02 of the pension plan provided that "the Company shall have the sole right at any time to terminate the entire plan." *Id.* at 374.

successfully challenged this action and the plan was not terminated until May 1, 1974.[7]

While the union's challenge to the company's attempt to terminate the pension plan was pending in the courts, the Minnesota Legislature enacted the Private Pension Benefit Protection Act (Pension Act), which established minimum standards for the funding and vesting of employee pensions.[8] White Motor was notified by Defendant E.I. Malone, State Commissioner of Labor and Industry, that in order to achieve compliance with the Pension Act, a pension funding charge of more than $19 million was necessary. White Motor filed suit in the United States District Court for the District of Minnesota, seeking declaratory relief holding the Pension Act unconstitutional.[9] Plaintiff moved for summary judgment or, in the alternative, for a preliminary injunction against enforcement of the Pension Act. The motion was premised upon the argument that the Pension Act conflicted with provisions and policies of the National Labor Relations Act (NLRA),[10] and was thus preempted by the supremacy clause of the United States Constitution.[11] Plaintiff contended that the Pension Act interfered with the free collective bargaining process mandated by the NLRA, in that it imposed obligations upon the company which, by the terms of its collective bargaining agreement with the UAW, it was not required to assume.[12]

The district court denied White Motor's motion for injunctive

7. *Id.* at 375. The union contended that the company could not terminate the pension plan until the expiration of the collective bargaining agreement. An arbitrator's decision and subsequent litigation upheld this contention, and the plan was not terminated until May 1, 1974. *See* International Union, UAW v. White Motor Corp., 505 F.2d 1193 (8th Cir. 1974), *cert. denied*, 421 U.S. 921 (1975).

8. MINN. STAT. ANN. §§ 181B.01-.17 (Supp. 1976) (effective April 10, 1974). According to the provisions of the Pension Act, any employer who ceased to operate a place of business or a pension plan would owe a "pension funding charge" to any employee who had completed ten or more years of credited service under a pension plan. In contrast to the provisions of White Motor's pension plan, which provided that benefits be paid only out of the pension fund, the Pension Act declared the amount of the charge to be a lien upon the employer's assets, and that any deficiency in the pension fund would be satisfied from the general funds of the employer.

9. White Motor's complaint, as amended, asserted violations of the supremacy, contract, due process and equal protection clauses of the United States Constitution. Malone v. White Motor Corp., 435 U.S. 497, 502 (1978).

10. 29 U.S.C. §§ 151-187 (1970).

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

12. 412 F. Supp. at 375. *Compare* the requirements of the Minnesota Pension Act discussed at note 8 *supra, with* the provisions of White Motor's collectively bargained plan discussed at note 3 and acompanying text *supra.*

relief and refused to declare the Pension Act invalid on preemption grounds.[13] The United States Court of Appeals for the Eighth Circuit reversed, holding that the Pension Act directly intruded upon the employer's substantive obligations under a pension plan that was freely negotiated through the collective bargaining process, and thus the Pension Act was preempted by federal labor law.[14] The defendant appealed, and the United States Supreme Court noted probable jurisdiction.[15]

The Supreme Court reversed,[16] holding that the NLRA does not preclude a state from regulating the substantive terms of pension plans, including those plans that are a product of collective bargaining.[17] In an opinion written by Justice White, the Court focused

13. 412 F. Supp. at 382. The district court concluded that the Pension Act did not interfere with the employer's duty to bargain over pensions, and that the collective bargaining process would not be frustrated by the State's regulation of the substantive terms of employee pension plans. *Id.* at 381-82.

The district court was persuaded by the provisions and legislative history of the Welfare and Pension Plans Disclosure Act (Pension Disclosure Act), 29 U.S.C. §§ 301-309 (1970), that Congress intended for the states to have the power to regulate pension plan operations and administration. 412 F. Supp. at 380.

14. White Motor Corp. v. Malone, 545 F.2d 599 (8th Cir. 1976), *rev'd*, 435 U.S. 497 (1978). In reversing the district court, the court of appeals relied upon the United States Supreme Court's decision in Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n., 427 U.S. 132 (1976), for the proposition that neither the states nor the NLRB have the power to influence the substantive terms of collective bargaining agreements through regulation of the conduct of the parties to collective bargaining negotiations. The court of appeals then reasoned that "[i]f states cannot control the economic weapons of the parties at the bargaining table, *a fortiori*, they may not directly control the substantive terms of the contract which results from that bargaining." 545 F.2d at 606.

The court of appeals also relied on Local 24, Int'l. Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959), in which the Supreme Court refused to apply a state antitrust law to the provisions of a collective bargaining agreement. Unlike the district court, which limited *Oliver* to antitrust statutes, the court of appeals read the decision broadly as standing for the proposition that "a state cannot modify or change an otherwise valid and effective provision of a collective bargaining agreement." 545 F.2d at 608.

Finally, the court of appeals rejected the contention that the Pension Disclosure Act authorized the states to change substantive terms of pension plan agreements. The court concluded that the preemption disclaimer, § 10(b) of the Pension Disclosure Act, merely allowed a state to maintain its existing power to regulate the management, administration and operation of employee benefit funds. *Id.* at 609.

15. 434 U.S. 813 (1977).

16. Malone v. White Motor Corp., 435 U.S. 497 (1978).

17. In a 4-3 decision (Blackmun and Brennan, JJ., not participating), the Court made it clear that they were dealing solely with plaintiff's argument that the Minnesota statute was preempted by federal labor laws. The case was remanded for the district court to consider the other constitutional issues raised by White Motor in its complaint, including the contentions that the Minnesota Pension Act impaired contractual obligations and violated the due

primarily on the intent of Congress, as reflected in the Pension Disclosure Act.[18] Citing *Retail Clerks International Association v. Schermerhorn,*[19] the Court began its analysis with the proposition that when Congress is silent on the question of whether it intends to preempt state laws by its legislation, the courts should sustain the local laws unless these laws conflict with the federal regulation, or the congressional intent to preempt state regulation can be implied from the scope and pervasiveness of the federal legislation.[20]

The Court noted that the mere fact that the Pension Act touches the interrelationships between employees, employers and unions does not automatically compel the conclusion that the Pension Act is preempted by the NLRA.[21] Quoting from its decision in *Garner v. Teamsters Local 776,*[22] the Court postulated that the NLRA leaves much more room for state regulation, and that it is the duty of the courts to ascertain the areas in which state regulation is permissible.[23] Although acknowledging that pension plans are mandatory subjects of collective bargaining, the Court nevertheless found no express language in the NLRA that would preclude all state regulation in this area.[24] Therefore, if the Pension Act was to

process clause of the Constitution. 435 U.S. at 514-15. In another case involving similar questions, the Supreme Court ruled that the Pension Act did impair contractual obligations in violation of the contract clause. *See* Allied Structural Steel Co. v. Spannaus, 98 S. Ct. 2716 (1978).

18. The Pension Disclosure Act was expressly repealed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1031(a)(1) (Supp. V 1975). The repeal, however, did not take effect until January 1, 1975, after the operative events of this case.

19. 375 U.S. 96 (1963) (holding that in preemption cases, if Congress has manifested its intent, courts must give effect to that intent).

20. 435 U.S. at 504. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (presumption is against preemption unless a clear congressional intent to preempt is present). Recent decisions are indicative of the growing reluctance of the Supreme Court to imply this congressional intent to preempt state laws. *See generally* Catz and Lenard, *The Demise of the Implied Federal Preemption Doctrine,* 4 HASTINGS CONST. L.Q. 295 (1977). *See also* Ray v. Atlantic Richfield Co., 98 S. Ct. 988 (1978) (state statute regulating design, size and movement of oil tankers is preempted by Federal Ports and Waterways Safety Act, but only to the extent that there is an actual conflict between provisions of the two statutes).

21. 435 U.S. at 504 (quoting Amalgamated Ass'n. of Street, Electric Railway and Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971)).

22. 346 U.S. 485 (1953).

23. 435 U.S. at 504.

24. *Id.* Sections 8(a)(5) and 8(a)(3) of the NLRA require employers and unions to bargain in good faith with respect to wages, hours and other terms and conditions of employment. *See* Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948) (firmly established the principle that a pension plan is a proper subject for collective bargaining). *See also* NLRB v. Niles-Bement-Pond Co., 199 F.2d. 713 (2d Cir. 1952) (holding that "wages" includes pension and retirement plans).

be preempted, the requisite congressional intent would have to be implied.[25]

After an extensive review of the provisions and legislative history of the Pension Disclosure Act, the Court concluded that not only did Congress not intend to preempt state regulation of pension plans, but also that the Pension Disclosure Act anticipated a wide regulatory role for the States.[26] Unlike the court of appeals, which found that the preemption disclaimer in the Pension Disclosure Act related only to state statutes governing civil and criminal liabilities for misappropriation and misuse of pension trust funds,[27] the Supreme Court was persuaded that this preemption disclaimer expressly reserved to the states the power to regulate the substantive terms of pension plan agreements.[28]

Looking to the objectives of the Pension Disclosure Act as reflected in its legislative history, the Court found that the 1958 Act was only the first step in protecting the workers' interest in their pensions.[29] The Court believed that this statute was designed to deal only with the disclosure aspects of pension plans, leaving regulatory responsibility with the States.[30] Since an examination of the legislative history also reflected that Congress was aware of the problems of unfair vesting requirements, inadequate funding, and unexpected termination,[31] the Court reasoned that Congress' failure to deal with

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25. *See* note 20 and accompanying text *supra.*

26. 435 U.S. at 512.

27. *See* note 14 *supra.*

28. 435 U.S. at 505. Section 10(b) of the Pension Disclosure Act reads:

> The provisions of this Act, except subsection (a) of this section, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.

Also, the Court felt that Section 10(a) of the Pension Disclosure Act indicated congressional intent to allow the States to maintain their regulatory power over pension plans. Section 10(a) provides in relevant part:

"Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan."

29. 435 U.S. at 506. The Court found support for this conclusion in the Senate Report on the bill, S. REP. No. 1440, 85th Cong., 2d Sess. *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 4137 [hereinafter cited as S. REP. No. 1440], as well as in floor comments made by supporters of the bill. 435 U.S. at 507-09.

30. 435 U.S. at 507. *See* S. REP. No. 1440, *supra* note 29, at 4153-54.

31. S. REP. No. 1440, *supra* note 29, at 4150-52.

these problems indicated an intent to leave this regulation to the States.[32] The Court also found in the legislative history a congressional awareness that the Pension Disclosure Act would apply to pension plans that were the product of collective bargaining.[33]

Finally, because of the broad language employed by the Supreme Court in its decision in *Local 24, International Brotherhood of Teamsters v. Oliver*,[34] which indicated that a State was precluded from regulating the substantive terms of a collective bargaining agreement, the Court was forced to find a method of reconciling its decision in *Malone* with *Oliver*.[35] Toward that end, Justice White noted that the *Oliver* decision clearly provided for an exception to the preemption doctrine if Congress indicated that the solutions arrived at by the parties were within the reach of a state's regulatory power.[36] According to Justice White, the Pension Disclosure Act implied this congressional approval of state regulation, and therefore the *Malone* decision, resting primarily on this approval, was not inconsistent with *Oliver*.[37]

Justice Stewart, in his dissent, maintained that the majority, in implying congressional authorization of Minnesota's statutory modification of an existing collective bargaining agreement, did so on the basis of Congress' failure to enact its own substantive regula-

32. 435 U.S. at 510. Thus, as is pointed out in both dissenting opinions, the Court rested its justification for upholding the Minnesota Pension Act not on an affirmative expression of congressional intent, but on an inference of congressional intent drawn from Congress' failure to enact substantive regulations for pension plans at the time the Pension Disclosure Act was enacted. *See* notes 38 and 43 and accompanying text *infra*.

33. 435 U.S. at 508 n.9. According to the Court, "neither the bill as enacted nor its legislative history drew a distinction between collectively bargained and all other plans, either with regard to the disclosure role of the federal legislation or the regulatory functions that would remain with the States." *Id.* at 508-09.

34. 358 U.S. 283, 295-96 (1959). In *Oliver* the Court held that a state antitrust law could not be applied to prohibit the parties from carrying out the terms of a collective bargaining agreement. In so holding, the Court recognized that Congress had provided for a scheme of federal law applicable to the response of the parties in their duty to bargain collectively, and that "there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." *Id.* at 296.

35. The district court, in its decision, circumvented the *Oliver* doctrine by limiting the decision to state antitrust statutes. White Motor Corp. v. Malone, 412 F. Supp. at 381. The court of appeals, in reversing, followed the broad language in *Oliver*. *See* note 14 *supra*.

36. 435 U.S. at 513. The implication in *Oliver* is that preemption occurs only when "[t]he solution worked out by the parties [is] not one of a sort which Congress has indicated may be left to prohibition by the several States." 358 U.S. at 296.

37. 435 U.S. at 514.

tions of pension plans. He was not convinced that such an inference, drawn from what Congress failed to enact, was sufficient to override federal labor policy by placing restrictions on the parties' solutions to mandatory subjects of collective bargaining.[38]

Expanding upon the principles discussed by Justice Stewart, Justice Powell, in a separate dissent, expressed concern regarding the restrictive effect that application of the Minnesota Pension Act would have on the collective bargaining process.[39] He stated that the Pension Act created a conflict between a federally sanctioned labor agreement and a state policy which sought to adjust commercial relationships,[40] and that the state statute was therefore necessarily preempted by federal law.[41] He was also troubled by the retroactive application of the Pension Act to an existing labor agreement. According to Justice Powell, had the parties known of this statutory development, the provisions of the plan would likely have been different.[42] He concluded that the States may not change the economic bargain struck by the parties at the bargaining table by altering the terms of existing collective bargaining agreements on mandatory subjects of collective bargaining, at least not without a clearer indication of congressional authorization than the majority found in the Pension Disclosure Act.[43]

Since Congress began legislating in the area of labor relations, the Supreme Court has been faced with the problem of deciding when

38. *Id.* at 515-16 (Stewart, J., dissenting).

39. *Id.* at 516. Powell argued that application of the Pension Act, which restricted the available options to either no pension or a fully funded pension that vests after ten years of service, could discourage employer participation in retirement planning. *Id.*

40. *Id.* at 516. (Powell, J., dissenting). A well-recognized exception to the preemption doctrine is state policy dealing with local health or safety regulations. *See, e.g.*, Farmer v. Carpenters, Local 25, 430 U.S. 290 (1977), discussed at note 48 *infra*. It has been suggested that the test is "whether the state law regulates labor relations in order to adjust conflicts of interest between employers and employees or seeks to protect other interests which the state deems paramount and whose advancement only collaterally affects issues of labor policy." Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 242 (1950). Of course, if the federal statute involved expressly superseded all related state law, preemption should occur regardless of any possible exceptions to the preemption doctrine. *See, e.g.*, § 1144 of ERISA.

41. Powell argued that the Pension Act did not fall within the health and safety exception. 435 U.S. at 516 (Powell, J., dissenting). The majority, because they decided the preemption issue on the basis of the Pension Disclosure Act, specifically stated that they did not pass on appellant's contention that the Minnesota statute was within the exception. *Id.* at 513 n.13.

42. *Id.* at 516-17. (Powell, J., dissenting).

43. *Id.* at 517-18.

state statutes are preempted by federal labor law. After more than two decades of experimenting with different approaches to the issue,[44] the Court, in 1959, enunciated a broad preemption doctrine in *San Diego Building Trades Council v. Garmon.*[45] The test announced by the Court was that if an activity is "arguably subject" to Section 7 or Section 8 of the NLRA, both the States and the federal courts must defer to the exclusive competence of the NLRB.[46] Thus, after *Garmon,* the preemption doctrine applied to invalidate state regulation not only when it actually conflicted with federal labor policy, but also if there was even a potential conflict.

With some modifications,[47] the *Garmon* rule has proved to be a workable one and is still employed by the Court.[48] An examination

44. One test which the Court applied was whether the Federal Act had so occupied the field as to preclude state regulation. *See, e.g.,* Garner v. Teamsters Local 776, 346 U.S. 485 (1953). Another test was whether the state regulation was in direct conflict with the national regulatory scheme. *See, e.g.,* Motor Coach Employees Div. 998 v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951); Hill v. Florida, 325 U.S. 538 (1945). A third test, announced in UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949), permitted the state courts to determine whether the activity at issue was protected under Section 7 or prohibited under Section 8 of the NLRA. This case was expressly overruled by Lodge 76 International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 155 (1976). *See generally* Cox, *Labor Law Preemption: Revisited,* 85 HARV. L. REV. 1337 (1972); 18A T. KHEEL, BUSINESS ORGANIZATIONS ¶ 9.02 (1978).

45. 359 U.S. 236 (1959).

46. *Id.* at 244-45. The Court in *Garmon* and in subsequent decisions, carved out two important exceptions to this "arguably subject" rule. First, federal labor policy does not preclude states from regulating activities involving deeply rooted local interests. *See, e.g.,* Vaca v. Sipes, 386 U.S. 171 (1967) (union duty of fair representation regarded as touching deeply rooted local interests). Second, federal labor law does not preempt state regulation that is of a mere peripheral concern to the federal law. *See, e.g.,* International Ass'n. of Machinists v. Gonzales, 356 U.S. 617, 620 (1959) (state court is not precluded from ordering reinstatement of expelled union member since there exists only a "remote possibility" of conflict with the NLRB's enforcement of national labor policy). *See generally* Hooton, *The Exceptional Garmon Doctrine,* 26 LAB. L.J. 49 (1975).

47. The Supreme Court in Teamsters Local 20 v. Morton, 377 U.S. 252 (1964), modified the preemption doctrine by holding that even when acitvity was not arguably protected by § 7 or arguably prohibited by § 8, state regulation was precluded if the Court found that by not regulating the activity, Congress intended that it be free from regulation. This principle was later applied in Lodge 76, Machinists v. Wisconsin Employment Relations Bd., 427 U.S. 132 (1976), in which the Court held that "Congress meant to leave some activities to be controlled by the free play of economic forces." *Id.* at 144.

48. *See, e.g.,* Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). *See also* Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon,* 72 COLUM. L. REV. 469 (1972).

In spite of this apparent vitality of *Garmon,* however, there appears to be an increasing willingness on the part of the present Supreme Court to circumvent the preemption doctrine by attaching increasing importance to the states' rights to regulate local activities. For exam-

of other *Garmon*-type preemption cases reveals that almost all of these prior cases dealt with a state's attempted regulation of *conduct* potentially subject to the provisions of the NLRA. The question presented in each instance was whether a state's regulation of the economic weapons available to parties to collective bargaining, through the regulation of the employer's or employees' conduct, was preempted by federal labor law. The question presented to the Court in *Malone,* on the other hand, involved a state's attempt to limit the possible solutions available to parties at the bargaining table by imposing minimum requirements on the substantive terms of collective bargaining agreements.[49] Application of the *Garmon* test by asking whether this is "arguably subject" to NLRB jurisdiction is of little assistance in a *Malone* situation since the Supreme Court long ago held that the NLRB does not have the power to regulate the substantive terms of collective bargaining agreements.[50] The Court should, therefore, analyze the issue in terms of striking a balance between the State's interest in imposing these requirements on the provisions of the collective bargaining agreements[51] and the federal interest in maintaining a bargaining process free from substantive regulation.[52]

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ple, in Farmer v. Carpenters, Local 25, 430 U.S. 290 (1977), the Court ruled that a union member's state suit against the union for intentional infliction of emotional distress was not preempted by federal labor laws. In so holding, the Court acknowledged the vitality of the *Garmon* doctrine, but ruled that the "state's interest in protecting the health and well-being of its citizens" outweighed the possible effect on federal labor law that state regulation might have. *Id.* at 303-04. For a discussion of the policies behind this state-protective approach to federal preemption, see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 COLUM. L. REV. 623 (1975) [hereinafter cited as *Preemption Doctrine*].

49. This distinction may explain why neither the majority opinion nor the dissenting opinions in *Malone* cited the *Garmon* decision.

50. NLRB v. Insurance Agents, 361 U.S. 477 (1960). The Court in *Insurance Agents* held that when Congress enacted the NLRA, it was not concerned with the substantive terms upon which the parties contracted. A cease and desist order issued by the Board to control union pressure tactics during negotiations was viewed as an intrusion into the substantive aspects of the bargaining process, in excess of the power conferred by the NLRA. *Id.* at 490.

51. Although the Supreme Court seldom articulates this balancing of the respective state and federal interests, examination of the Court's decisions generally indicates that this factor is the underlying basis for many decisions. *See* Comment, *Federal Preemption: Governmental Interests and the Role of the Supreme Court,* 1966 DUKE L.J. 484, 489.

52. *See* Note, *Federal Preemption and Collective Bargaining Agreements,* 1966 WIS. L. REV. 532, in which it is noted that the only Supreme Court decision dealing with a State's regulation of substantive terms of a labor agreement negotiated pursuant to the NLRA is Local 24, Int'l. Bhd. of Teamsters v. Oliver, discussed at note 34 *supra.* Other decisions which provide insight into the balance between federal labor policy and state interest involve the

In light of the foregoing principles of federal preemption, *Malone*, at first glance, would appear to have very little impact in the labor law area. By basing its decision on the presumed congressional authorization of the Minnesota Pension Act as reflected in the Pension Disclosure Act, the Court was able to avoid deciding the issue of whether the Minnesota statute dealt with social interests so deeply rooted in the State as to outweigh the policies of federal labor law, thus bringing it within the recognized health and safety exception to the preemption doctrine.[53] Had the Court chosen this latter approach, they would have had an opportunity to review the scope of the health and safety exception to federal preemption discussed in *Oliver*.[54] Such a review would undoubtedly have been a step toward clarifying the labor preemption area, which at least one commentator has described as "riddled with exceptions."[55]

Instead, the Court chose the less convincing argument that Congress somehow expressly authorized the states to regulate the substantive provisions of pension plans when it enacted the Pension Disclosure Act.[56] The majority found this congressional authorization in the fact that Congress failed to enact substantive regulations

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Court's interpretation of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970). For example, in Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956), the Court held that a State could not prohibit a "union shop" agreement made pursuant to the Railway Labor Act, which expressly authorizes such agreements. The Court stated that "[a] union agreement made pursuant to the Railway Labor Act has . . . the imprimatur of the federal law upon it and . . . could not be made illegal nor vitiated by any provisions of the laws of a State." *Id.* at 232. *See also* California v. Taylor, 353 U.S. 553 (1957) (terms of any collective bargaining agreement negotiated by employees of a state-owned railroad take precedence over conflicting provisions of state civil service laws).

53. This issue was extensively briefed by both parties, with appellant arguing that the Pension Act was a valid police power enactment directed toward the health and well-being of its citizens. Brief for Appellant at 40. The appellee argued that if the Court included the Pension Act within the health and safety exception, virtually all aspects of the employment relationship would be subject to state regulation, and the exception would swallow the rule. Brief for Appellee at 28.

54. Although the Court in Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1958), drew a sharp distinction between a collective bargaining agreement in conflict with a local health and safety regulation and a situation in which the conflict is between a federally sanctioned agreement and a state policy which specifically seeks to adjust commercial relationships, neither the scope nor the consequences of this distinction have ever been fully defined.

55. Hooton, *supra* note 46, at 49.

56. The provisions and legislative history of the Pension Disclosure Act simply do not support the conclusion of the majority. *See* the discussion at notes 58-62 and accompanying text *infra*.

when it enacted the Pension Disclosure Act.[57] The legislative reports which the majority cited in support of its conclusion do indicate that Congress, in enacting the Pension Disclosure Act, did not intend to substantively regulate pension plans, but merely intended to provide requirements for registration, reporting and disclosure.[58] It does not necessarily follow, however, that by preserving state laws affecting the operation or administration of employee or pension plans[59] Congress intended to authorize the type of substantive regulation contemplated by the Minnesota Pension Act.[60] The legislative history is more supportive of the position that Congress felt that *any* substantive regulation of pension plans was premature and that to place substantive requirements on plans might unduly restrict their development.[61] If, indeed, Congress believed in 1958 that federal regulation of the substantive provisions of pension plans might impede their future development, it is unlikely that they intended the preemption disclaimer in the Pension Disclosure Act to authorize the States to impose the very substantive regulations which were viewed by the sponsors of the legislation as being premature. It would appear, therefore, that the interpretation of the Pension Disclosure Act adopted by the court of appeals—namely, that the

57. 435 U.S. at 507.

58. *See* S. REP. No. 1440, *supra* note 29, at 4155.

59. 29 U.S.C. § 309(b) (1970).

60. At the time the 1958 Pension Disclosure Act was enacted by Congress, only six states had statutes dealing with the regulation of pension plans. *See* Isaacson, *Employee Welfare and Pension Plans: Regulation and Protection of Employee Rights*, 59 COLUM. L. REV. 97, 110 (1959). A review of these statutes demonstrates that none of them regulated substantive aspects of pension plans such as funding or vesting requirements. Of the six statutes in force in 1958, the most comprehensive was that enacted by New York. Like the other statutes, the major emphasis of the New York law was to open the operation of pension funds to close scrutiny by requiring the release of information through the filing of annual reports. *Id.* at 111. It is logical to assume that when Congress referred, in § 10(b) of the Pension Disclosure Act, to "any present or future law . . . of any State affecting *the operation or administration* of employee welfare or pension benefit plans" (emphasis supplied), it had in mind the same type of State regulatory laws as the six statutes in force in 1958.

61. One of the principal sponsors of the bill, Representative Teller, declared that "[o]ur bill . . . provides solely for disclosure. It does not go into the field of regulation, not because we do not believe that regulation is unnecessary [*sic*] but because we believe our further legislative efforts should await further investigation." 104 CONG. REC. 16421 (1958). *See also* Hearings Before the Subcommittee on Welfare and Pension Plans Legislation of the Senate Committee on Labor and Public Welfare, 85th Cong., 1st Sess. 134-36 (1957); Note, *Protection of Beneficiaries under Employee Benefit Plans*, 58 COLUM. L. REV. 78, 107 (1958) ("The chief objection advanced against immediate legislative adoption of substantive rules is that they would be premature, placing benefit plans in a strait jacket before they had an opportunity to find by experiment the most efficient and profitable modes of functioning").

preemption disclaimer contemplated only the state regulations dealing with management, disclosure and administration of pension plans—is more consistent with the legislative history of that statute. This legislative history indicates not only that Congress felt that substantive legislation in the pension area was premature in 1958, but also that Congress had every intention of imposing its own substantive regulations after further investigation.[62]

Deciding the *Malone* case on the basis of the health and safety exception to federal preemption, rather than on the Pension Disclosure Act interpretation, would have been a clearer indication of the Burger Court's movement toward protection of the states' interest in their police power regulations, which almost all of the Court's non-labor law preemption decisions since 1973 have followed.[63] These decisions seem to indicate that the Burger Court is willing to address questions of federal preemption with a greater eye toward maintaining the inherent police power of the states to regulate activities in which they have a high degree of interest, rather than presuming that Congress, by occupying a field, intended to displace all local regulation that directly or indirectly touches that field.[64]

In light of this trend which signals the Burger Court's more limited application of the preemption doctrine when the validity of a state's police power regulation is at stake, it is curious that the Court in *Malone* so carefully avoided the necessity of deciding whether Minnesota's regulation of pension plan terminations was a valid exercise of its police power, and thus not preempted by the NLRA.[65] Premising its decision on that basis would have been entirely consistent with the Court's abrogation of the presumed preemption doctrine, and would have been much more persuasive

62. This interpretation is further buttressed by the fact that Congress, in 1974, after years of investigation and legislative hearings, did impose its own substantive regulations when it enacted ERISA.

63. *See, e.g.*, DeCanas v. Bica, 424 U.S. 351 (1976) (state statute making it a crime for an employer to knowingly hire an illegal alien was not preempted by Immigration Nationality Act); Goldstein v. California, 412 U.S. 546 (1973) (state statute regulating duplication of musical recordings not preempted by federal copyright laws). *See also* Catz and Lenard, *supra* note 20, at 319-20; *Preemption Doctrine, supra* note 48,at 639-53.

64. *See* Catz and Lenard, *supra* note 20, at 320.

65. There would have been much support for the proposition that the regulation of employee pension plan terminations concerned matters affecting the health, safety and welfare of state citizens. As the Court noted in *DeCanas*, "States possess broad authority under their police power to regulate the employment relationship to protect workers within the state." 424 U.S. at 356.

than the decision based on an unconvincing interpretation of the Pension Disclosure Act.[66] This result would also have been an additional step toward a more concise clarification of the parameters of the health and safety exception to federal preemption.[67]

The real importance of *Malone,* therefore, lies not in the express holding of the Court that prior to ERISA, pension plans were proper subjects of state regulatory power, but rather in the fact that the Court rejected the opportunity to decide whether state regulation of pension plans should be included among the recognized exceptions to labor law preemption.[68]

It appears that the Court is not as willing or eager to apply the same state-protective preemption principles[69] in labor law cases as it is in other areas of the law. The fact that the Court chose the Pension Disclosure Act argument in *Malone* to avoid deciding the health and safety issue is evidence of a conservatism in the labor preemption area not present in other areas in which federal preemption is at issue. This reluctance of the Court to address the contention that the Minnesota Pension Act was within the health and safety exception indicates that a state's interests in its police power regulations must indeed be substantial before the Court will view them as outweighing the federal labor policies contained in the privisions of the NLRA. Unfortunately, the Supreme Court, in *Malone,* declined to clarify how substantial these interests must be before inclusion among the recognized exceptions to federal preemption is justified.

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66. *See* notes 58-62 and accompanying text *supra.*

67. Of course, after the enactment of ERISA, it is clear that state regulation of pension plans is expressly preempted by the federal law. *See* 29 U.S.C. § 1144(a) (1975). Thus, the narrow issue of whether pension plan regulation falls within the health and safety exception to federal preemption is now a moot question. *See* note 40 *supra.*

68. Indeed, during oral argument, after a series of questions by which the Justices sought to ascertain what appellant's view was of the outer limits of a state's regulatory power over the employment relationship, Justice White remarked that the Court need not reach these questions if they accepted the argument about the 1958 Pension Disclosure Act. *See* 1978 BNA Daily Labor Report, No. 7, p. A-10 (Jan. 11, 1978).

69. *See* text accompanying note 63 *supra.*