When Does ERISA Preempt New York's Prevailing Wage Law?

By Matthew A. Siebel and Matthew J. Vance

I. New York's Prevailing Wage Law

Section 220 of the New York Labor Law[1] governs the working conditions for workers engaged in public contracts for the state of New York and its subdivisions. In addition to governing the maximum hours such workers may work, subsection (3) of section 220 requires that contractors on public works projects pay their employees wages and supplements which are at least equal to the prevailing wages and supplements paid to workers employed in the same trade or occupation of that locality. This subsection is often referred to as the Prevailing Wage Law (PWL).

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The term "supplements" is defined by Lab. Law § 220(5)(b) to include "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages'. . . including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training." Effective February 26, 1992, supplements include the amount of irrevocable contributions made on behalf of a worker to a fund, plan or program designed to provide supplements and the cost that is actually incurred in providing supplements not covered by such funds, plans or programs provided that such supplements are listed on the prevailing schedule prepared by the Commissioner of Labor.[2] Further, since 1992, any or all of an employer's supplement obligation can be satisfied by providing to its employees directly the cash equivalent of such supplement.[3]

The party responsible for determining the amount of the prevailing wages and supplements in a locality is known as the Fiscal Officer.[4] The Fiscal Officer determines the amount of supplements according to the "prevailing practices in the locality."[5] This amount is determined by reference to the amounts paid to workers in the same locality pursuant to the terms of the collective bargaining agreements that local unions negotiate on their behalf.[6] The Fiscal Officer is empowered to bring an action for enforcement of the PWL under Lab. Law § 223.

II. The ERISA Preemption Doctrine

The Employee Retirement Income Security Act of 1974[7] (ERISA) "subjects to federal regulation plans providing employees with certain fringe benefits. It is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."[8] ERISA itself does not provide or fund benefit plans. Rather, "private parties, not the Government, control the level of benefits."[9] Pursuant to 29 U.S.C. § 1144(a),[10] certain state laws are preempted by ERISA. This section holds: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) . . . and not exempt under section 4(b) . . ."

Acknowledging that early interpretations of this language represented a "form of 'uncritical literalism'" as to what laws "relate to" ERISA, 11 more recent cases have reflected a view that "analysis under ERISA's preemption clause must begin with the 'starting presumption that Congress does not intend to supplant state law'". . . [12] In this regard, the Second Circuit has identified what it calls a "trend"[13] to not find state laws preempted by ERISA. This trend includes *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,[14] where the Supreme Court sought to narrow what type of laws "relate to" ERISA and held that only "state laws that mandate[] employee benefit structures or their administration," or that "provid[e] alternative enforcement mechanisms" are preempted.[15] By establishing this approach, the Supreme Court sought to ensure that "[p]reemption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability."[16]

The first of the two preemption scenarios noted in the *Travelers* decision was discussed by the Second Circuit in *General Electric Co. v. New York State Department of Labor*.[17] The Second Circuit's decision specifies three ways in which a "state law 'relates to' [an] employee benefit plan . . ."[18] for preemption purposes. First, "[s]uch connection exists where a state statute prescribes . . . the type and amount of an employer's contributions to a plan . . . "[19] Second, preemption will be found if the state law mandates "the rules and regulations under which the plan operates . . . "[20] Third, if "the nature and amount of benefits provided thereunder" are specified by the state law, then ERISA preempts.[21]

The second scenario of ERISA preemption—the "alternative enforcement mechanism"—exists where the state law adds "to the remedies available for recovery"[22] with respect to ERISA benefits. The decision in the case of *Ingersoll-Rand Co. v. McClendon* provides another statement of "alternative enforcement mechanism," where the Supreme Court indicated that the state law will be preempted by ERISA when it "provide[s] a remedy for the violation of a right expressly guaranteed by [ERISA] § 510 and exclusively enforced by § 502(a)."[23] In short, ERISA's list of remedies are exclusive; any attempt by a state to add to or change those rights will result in preemption.

Due to the fact that a contractor may meet its supplement obligations under the PWL (a state law) by making contributions to funds covered by ERISA, several New York state and federal cases have addressed the issue of whether or not the PWL is preempted by ERISA. This article will examine and comment upon those cases.

III. History of ERISA Preemption of New York's Prevailing Wage Law

A. The *General Electric* Case

The stage for later ERISA preemption analysis of the PWL was set in the case of *A.L. Blades & Sons, Inc. v. Roberts*.[24] Here, the public works contractor attempted to satisfy its obligations under the PWL by substituting additional payments into the employees' pension fund for some of the payments scheduled by the Commissioner of Labor ("Commissioner"). Although the total cost of the benefits provided by the contractor equaled those listed in the Commissioner's schedule, the Commissioner determined this approach violated the PWL. The contractor sought review of the Commissioner's determination.[25]

Of significance to later ERISA preemption analysis, the Appellate Division's decision in favor of the Commissioner included the statement that "the Legislature intended that the Commissioner of Labor, not the contractor, determine the supplements to be provided and that the employee receive either the listed benefits or equivalent cash (or a combination of both)."[26] Thus, the court took the position that the PWL requires that the government, not employers, determine the level of benefits.

The first Second Circuit case to directly confront the ERISA preemption issue was *General Electric Co. v. New York State Department of Labor*.[27] Here, the contractor appealed an order of the U.S. District Court for the Southern District of New York in favor of the Commissioner in a case arising under the PWL. Plaintiff was signatory to a collective bargaining agreement with a local union which required it to make contributions to a number of nationally administered ERISA plans. The Commissioner determined that the contractor's supplements were different (and, in some cases, less) than those which the Commissioner claimed were due.

The trial court, ruling in favor of the Commissioner, held that the PWL required the contractor "either to bring the cost of its prescribed benefit into equivalence with the cost of the local prevailing one or to pay the additional cost directly to the employee-beneficiaries."[28] In addition, the contractor was not permitted to substitute one form of benefits for another because, in the court's view, the Commissioner, not the contractor, determines what supplements are due. Finally, the contractor received no credit for supplements not deemed to be "prevailing."

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Acknowledging that New York courts have held that the Commissioner, not employers, determine the level of benefits to be provided under the PWL, the Second Circuit ruled that, under ERISA, "private parties, not the Government, control the level of benefits."[29] The Second Circuit also explicitly rejected the view of the lower court that "section 220 does not 'do anything other than consider the value to the employee of contributions to [ERISA] as compared to the value of contributions made to similar plans by other employers in the industry and locality'"[30] and held that the portion of the PWL dealing with "supplements" was preempted by ERISA.

The court noted that the PWL impermissibly "relates to" ERISA on a number of levels. First, the PWL requires ex-locality employers either to bring benefit plans into conformity with those prevailing in the locality or to make up the difference through cash payments. Second, the court noted that such contractors are required to keep records relating to supplements and to make these records available for inspection. The court concluded that "the above-described provisions of section 220 clearly relate to the ERISA plans of ex-locality employers and are preempted by the federal statute."[31]

B. "Line Item" vs. "Total Package"

Although the *General Electric* case appeared to have set a rule in holding that the supplement provision of the PWL was preempted by ERISA, subsequent cases have not been consistent with this decision and have

weakly applied its holding.[32] Courts that have examined this issue subsequent to *General Electric* have not focused on the PWL itself, but rather the manner in which it is enforced by the Fiscal Officer.

In *Tap Electrical Contracting Service, Inc. v. Hartnett*,[33] the contractor provided supplements through a combination of benefits and lump sum cash payments. A number of the supplement plans were covered by ERISA and others were not. To further comply with the applicable prevailing wage-rate schedule, the contractor made payments towards both the ERISA and non-ERISA supplements by making cash payments directly to employees.

The Commissioner investigated and charged the contractor with willfully violating the PWL. The petitioner commenced an Article 78 proceeding arguing that the PWL was preempted by ERISA. The Appellate Division agreed with the contractor in accordance with *General Electric* insofar as the decision related to the ERISA supplements and the matter was remitted to the Commissioner to calculate the amount by which the contractor had underpaid the non-ERISA supplements.

In recalculating the amount of the underpayments, the Commissioner, "rather than applying the full amount of the weekly cash payments to the non-ERISA supplements . . . apportioned those payments between the ERISA supplements and the non-ERISA supplements."[34] The contractor's payments were again found to be deficient. The contractor therefore commenced a second Article 78 proceeding claiming "that because the order applied to a portion of the weekly cash payments to ERISA supplements, the order 'related to' and, therefore, was preempted by, ERISA."[35] The Appellate Division agreed, holding that by applying a portion of the weekly cash payments to ERISA supplements, the Commissioner determined the amount of an employee's benefit and also "created a funding requirement and provided a rule for the calculation of the amount of the benefits to be paid under the employees' ERISA plans."[36] As such, the Commissioner's order was determined to be preempted by ERISA.

The first case to examine the relationship between ERISA preemption and the PWL subsequent to the *Travelers* decision was *Burgio and Campofelice, Inc. v. New York State Department of Labor*.[37] Here, a contractor, arguing ERISA preemption, sought to enjoin the state from enforcing the PWL. The trial court, relying upon the Second Circuit's decision in *General Electric*,[38] granted summary judgment to the contractor. Below, the state had unsuccessfully argued that it had changed its PWL enforcement policy such that it no longer was preempted by ERISA. The Second Circuit vacated and remanded for further proceedings based on the supposed change in enforcement policy. The court noted that the state had followed a "line-item" approach when *General Electric* was decided. Under the "line-item" approach, the Commissioner

> prescribed prevailing benefits levels for each individual type of wage supplement. In each instance where the cost of a supplement provided for in an employment contract did not correspond with the cost of a similar prevailing local benefit, section 220 required the employer either to bring the cost of its prescribed benefit into equivalence with the cost of the local prevailing one or to pay the additional cost directly to the employee-beneficiaries. The employer was not permitted to substitute one form of supplement for another, and received no credit under the statute for the cost of providing benefits not deemed to be "prevailing benefits" by the Commissioner.[39]

The state submitted that the "line-item" approach had been replaced by a "total package" approach which

> simply requires employers to match the total cost of all prevailing supplements. Employers are no longer required to match one-for-one the specific prevailing rate for each prevailing supplement, or even to provide each type of prevailing supplement. Thus, according to the State, the total package approach avoids those requirements that led the GE I court to find preemption.[40]

The court then examined the "total package" approach within the framework established by *Travelers* and inquired as to whether this approach mandates employee benefit structures or their administration or provides for an alternative enforcement mechanism. Noting that the "total package" was benefit-neutral and did not mandate an employee benefit structure or its administration, the court stated that

> an employer need not establish or contribute to any particular type of pension or welfare plan in any particular amount . . . an employer may provide supplemental benefits in any form or combination so long as the sum total is not less than locally prevailing benefits . . . Under such an enforcement scheme, it is no longer true that "under section 220, 'the Commissioner of Labor, not the contractor, determine[s] the supplements to be provided.'"[41]

The Second Circuit further held that the "total package" approach did not involve an "alternative enforcement mechanism":

> The monies that have been withheld from Burgio are not owed to an ERISA plan, to whom the subcontractor failed to pay contributions, but to individual workers . . . DOL, not the ERISA plans, will collect the monies due and disburse them to those workers . . . The State's enforcement action would therefore not fall "within the scope of" ERISA civil enforcement mechanism.[42]

Thus, the court held that the PWL is not *per se* preempted by ERISA. Rather, the court ruled that, depending upon the enforcement approach of the state, it is possible to enforce the supplement provisions of the PWL without running afoul of the ERISA preemption.

In *Beltrone Construction Co., Inc. v. McGowan*,[43] the Fiscal Officer utilized the prohibited "line-item" approach in issuing its schedule but attempted to justify its actions by presenting the novel argument that the enforcement proceedings did not conflict with ERISA because it thereafter used the "total package" enforcement procedure. That is, the Fiscal Officer totaled up the amounts listed on the schedule, arrived at a lump sum and compared this total amount to what had been paid by the contractor. Rejecting this argument, the Appellate Division held that when the Fiscal Officer issued its schedule, contractors were effectively directed to pay each benefit according to the schedule. As such, the Fiscal Officer was continuing to use the prohibited "line-item" approach and its determination that the contractor had violated the PWL was annulled.

The Second Circuit's recent decision in *HMI Mechanical Systems, Inc. v. McGowan*[44] gave the court an opportunity to discuss the PWL preemption controversy within the context of the use of subpoenas issued by the Fiscal Officer in a PWL compliance investigation. The New York State Department of Labor had commenced an investigation of a contractor to determine whether and to what extent supplement contributions made by the contractor had been "for work other than on public work contracts."[45] The investigation utilized an annualization formula found in 12 N.Y.C.R.R. § 220.2(d) which calculates the hourly cash equivalent of public work supplements paid by contractors.

In its investigation, the state issued subpoenas to plaintiffs' contractor and its plan administrator seeking information relating to payroll, contributions to the contractor's benefit plans and other detailed information concerning the allocation of benefits to the contractor's employees. The contractor and its plan administrator then sought injunctive relief and a declaration that "ERISA preempted the state's investigation into the internal allocation of supplemental wages. . . ."[46] During litigation, the Commissioner issued a notice which reminded New York employers of their obligations under the PWL, and discussed the manner in which the supplement provisions of the PWL are enforced. The notice also addressed the use of pooling funds as a means of escaping supplement obligations under the PWL.

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Plaintiffs argued that the subpoenas and the regulatory notice evidenced an intent to "examine the internal allocation of benefits . . . and judge the adequacy of benefits distributed under the plan."[47] Plaintiffs also argued that the annualization formula was preempted by ERISA because it "binds plaintiffs to a particular method of administering the ERISA plan and requires plaintiffs to make continuous calculations, adjustments and payments for Section 220 compliance."[48] Plaintiffs submitted that the state's approach constituted a retreat to the prohibited "line-item" approach by focusing on the internal allocation and adequacy of benefits and attempting to mandate employee benefit structures and their administration. The Commissioner responded that he was merely attempting to determine the amount of the contractors' supplement contributions and that any impact on ERISA plans was indirect.

The Second Circuit agreed with the plaintiffs' preemption arguments to the extent that the state was seeking to examine the actual benefits that plan participants received. The court also found the wording of the subpoenas "particularly troublesome" because of the type of information sought.[49] However, persuaded by a concession made in oral argument below by the state's counsel that all the state actually needed for the annualization formula was the total number of hours worked and the total number of benefits received, the court held that "[t]he state [was] not through its inquiry mandating a particular benefit structure for ERISA plans," the crucial issue in *General Electric*.[50] While the court agreed that the original subpoenas were overly broad to the extent that they sought to examine the internal allocation of benefits that employees actually receive, the court stated that "information such as a list of plan participants, payroll lists, the amount of an employer's con-

tributions and the names of people for whom the employer made contributions are appropriate areas of inquiry substantially similar to the record production we approved in Burgio."[51]

Further, while plaintiffs claimed that the annualization formula involved a judgment about the adequacy of ERISA benefits and bound contractors to a particular method of administering an ERISA plan, the court held that the state sought only to examine total contributions, not to require employers to make particular contributions to an ERISA plan. Thus, the court ruled that the use of the annualization formula is consistent with the "total package" approach because "the formula on its face is concerned with the level of the employer's contribution rather than the benefit that any worker receives. . . ."[52] In conclusion, the court ruled that while the state's approach had a direct effect on employers by discouraging pooling, it had only an indirect effect on ERISA plans. Therefore, the court found that the state's enforcement approach was not preempted by ERISA.

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IV. Conclusion

The state and federal case law of New York seems to have reached a somewhat tenuous resolution of the preemption of the PWL by ERISA. That is, based on the framework established in the cases examined above, a court examining the issue of preemption must examine not the PWL itself, but rather, how the state chooses to enforce it. This approach has resulted in a situation whereby cases involving the PWL must be examined on a case-by-case basis depending on the particular enforcement approach of the Fiscal Officer. For example, in *HMI*, the issue was framed in terms of the state's attempt to issue a subpoena to judge compliance with the PWL. In this case, resolution of the issue came from the state's concessions during oral argument that only certain information was actually needed. Such an approach hardly seems static and paves the way for numerous other disputes concerning particular enforcement approaches to raise the preemption specter again and again.

Further, while the current trend to not find preemption is reflective of the general trend in this area subsequent to the *Travelers* decision, the approach of New York courts seems to run afoul of the seminal *General Electric* case. There, the court made no distinction in how the law was actually enforced but simply held that the supplement provisions of the PWL were preempted by ERISA. As such, it would appear that a more definitive resolution of this issue is in order to avoid future litigation of every nuance of the state's enforcement approach.[53]

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Endnotes

1. McKinney's Consolidated Laws of New York, Labor Law, Chapter 31 of the Consolidated Laws, Article 8, "Public Work," § 220 "Hours, wages and supplements." ("Lab. Law").
2. 12 N.Y.C.R.R. § 220.2(a)(1), (2).
3. 12 N.Y.C.R.R. § 220.2(b).
4. Lab. Law § 220(3). Pursuant to Lab. Law § 220(5)(e), the Fiscal Officer is the Commissioner of Labor on all projects that are performed by or on behalf of the state, a public benefit corporation, a county, a village or city with a population of less than one million people. If the work takes place on behalf of a city with a population of more than one million people, the Fiscal Officer is that City's Comptroller.
5. Lab. Law § 220(3).
6. Lab. Law § 220(5)(c).
7. 29 U.S.C. § 1001 *et seq.*
8. *Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1000, 1007 (2d Cir. 1997).
9. *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504 (1981).
10. Alternatively cited here and elsewhere as ERISA § 514(a).
11. *Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co., Inc.*, 126 F.3d 61, 66 (2d Cir. 1997) (quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) and citing *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995)).
12. *Id.* at 66–67 (quoting *Travelers Ins. Co.*, 514 U.S. at 654).
13. *Id.* at 66.
14. 514 U.S. 645 (1995).
15. *Id.* at 658.
16. *Id.* at 661 (quoting *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 n.1 (1992)). *See Dillingham*, 519 U.S. 316 (where the Supreme Court stated that "if ERISA were concerned with any state action . . . we could scarcely see the end of ERISA's pre-emptive reach, and the words 'relate to' would limit nothing").

17. 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990).
18. *Id.* at 28.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1000, 1009 (2d Cir. 1997).
23. 498 U.S. 133, 145 (1990).
24. 136 A.D.2d 926, 524 N.Y.S.2d 912 (4th Dep't 1988).
25. Pursuant to Lab. Law § 220(8), review of the Fiscal Officer's determination of noncompliance with the PWL is through the commencement of an Article 78 proceeding.
26. *A.L. Blades & Sons, Inc. v. Roberts*, 136 A.D.2d 926, 927, 524 N.Y.S.2d 912 (4th Dep't 1988).
27. 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990).
28. *Id.* at 27.
29. *Id.* at 28 (quoting *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 511 (1981)).
30. *Id.* (quoting *Rondout Elec., Inc. v. New York State Dep't of Labor*, 84 Civ. 3095 (S.D.N.Y. 1984)).
31. *Id.* at 29.
32. *New York Employment Law*, § 35.08[4][d][v] (2d ed. 2000). "The Appellate Division, Second Department, however, has read the holding of *General Electric* narrowly."
33. 207 A.D.2d 547, 616 N.Y.S.2d 86 (2d Dep't 1994).
34. *Id.* at 548.
35. *Id.* at 549.
36. *Id.* at 550.
37. 107 F.3d 1000 (2d Cir. 1997).
38. Referred to by the Court as "GE I".
39. *Burgio & Campofelice, Inc.*, 107 F.3d at 1003–1004.
40. *Id.* at 1004.
41. *Id.* at 1009 (quoting *General Elec. Co. v. New York State Dep't of Labor*, 891 F.2d 25, 28 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1989) (quoting *A.L. Blades & Sons, Inc., v. Roberts*, 136 A.D.2d 926, 927, 524 N.Y.S.2d 912 (4th Dep't 1988)).
42. *Id.* at 1010.
43. 260 A.D.2d 870, 688 N.Y.S.2d 783 (3d Dep't 1999).
44. 266 F.3d 142 (2d Cir. 2001).
45. *Id.* at 146. The purpose of the investigation was to determine whether plaintiff was taking part in a process known as "pooling" which allows an employer to dilute supplements due each public works employee by spreading the benefits out to cover both public and private work.
46. *Id.*
47. *Id.* at 148.
48. *Id.*
49. *Id.* at 150.
50. *Id.* at 151.
51. *Id.*
52. *Id.*
53. Although examined within the contexts of the applicable state prevailing wage law, a number of other circuits have also held that these laws are not preempted by ERISA. *See Associated Builders & Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386, 393 (6th Cir. 1997) (The Michigan Prevailing Wage Act is not preempted by ERISA in that the law "does not relate to any employee benefit plan within the meaning of section 514(a) of ERISA"); *WSB Electric, Inc. v. Curry*, 88 F.3d 788 (9th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997) (ERISA's preemption provision is not implicated by California's prevailing wage law); *Minnesota Chapter of Associated Builders & Contractors, Inc. v. Minnesota Dep't of Labor & Indus.*, 47 F.3d 975 (8th Cir. 1995) (ERISA does not preempt where Minnesota's prevailing wage law does not relate to an ERISA benefit plan); *Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley*, 37 F.3d 945 (3d Cir. 1994), *cert. denied*, 514 U.S. 1032 (1995) (although an administrative order issued by the state agency was preempted by ERISA, the text of Pennsylvania's prevailing wage law and regulations issued thereunder were not preempted).