Wisconsin's Prevailing Wage Laws: Why They Have Been Preempted by the Employee Retirement Income Security Act

Bradley C. Fulton

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol80/iss1/9

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
WISCONSIN'S PREVAILING WAGE LAWS:  
WHY THEY HAVE BEEN PREEMPTED BY  
THE EMPLOYEE RETIREMENT INCOME SECURITY  
ACT

I. INTRODUCTION

During the Great Depression, as construction laborers from the South migrated to the North in search of a better way of life, organized labor and northern construction contractors pleaded with Congress to protect local labor from “cheap [migratory] labor.”1 They demanded protection from unfair competition from outside contractors who were securing government contracts by “bas[ing] their bids on wage levels lower than those [that] actually prevailed in the locality.”2 Local workers protested because their wage standards and conditions were broken down and they were denied work by those contractors who recruited cheap labor from distant areas.3 The local communities requested assistance due to their citizens’ loss of work and purchasing power.4 In 1931, the federal Davis-Bacon Act5 was enacted to ensure that public money was not spent in a manner which would depress a locally prevailing wage structure.6 Soon after, many states, including Wisconsin, passed “little Davis-Bacon” acts.7 The Davis-Bacon Act was amended in 1964, to ensure that fringe benefits would be included in a locality’s prevailing wage.8 Accordingly, Wisconsin and the other states followed suit.

Wisconsin’s Prevailing Wage Laws9 and the other Davis-Bacon progenies following the federal government’s lead, mandate that prevailing wages, namely union wages, be paid to all workers on publicly-funded construction projects. Before the State or a municipality enters into a construction contract, it must first apply to the Department of Workforce Development (“the Department”) to determine the

1. 74 CONG. REC. H6513 (1930-31).
3. Id.
4. Id.
7. Id. at 1141.
prevailing wage rate. The Department determines the prevailing wage rate according to the standards outlined in the prevailing wage laws.

Wisconsin’s Prevailing Wage Laws define “prevailing wage rate” as “the hourly basic rate paid plus the hourly contribution for [fringe benefits].” All bids must reference the prevailing wage rates and all publicly-funded construction contracts must state the prevailing wage rates applicable to the project. A contractor who fails to pay prevailing wages is subject to payment of double the amount of unpaid wages and reasonable attorney fees.

Although many people have questioned the motives behind such legislation, it is not necessary to determine whether the public policy behind prevailing wage legislation is good or bad because these laws, in particular, Wisconsin’s Prevailing Wage Laws, have been preempted by federal legislation, specifically, the Employee Retirement Income Security Act (“ERISA”).

Enacted in 1974, “ERISA provides uniform federal regulation of employee [welfare and pension] benefit plans.” ERISA establishes the regulation of employee benefit plans as an area of exclusive federal concern. A recent line of cases has utilized ERISA’s broad preemption clause to hold that ERISA preempts state prevailing wage legisla-

10. Id. § 66.293(3).
11. Id. § 103.49(1)(d).
12. Id.
13. Id. § 103.49(2).
14. Id. § 66.293(3)(a).
15. There is substantial evidence that not only were these prevailing wage laws enacted for discriminatory reasons, but they have a discriminatory impact on minority laborers today. See Nona M. Brazier, Stop Law That Hurts My Minority Business, WALL ST. J., Jan. 12, 1994, at A10; Editorial, Davis-Bacon Meets Jim Crow, WALL ST. J., May 22, 1992, at A10. These claims are rooted in the Congressional debates prior to the enactment of the original Davis-Bacon Act. While debating the bill in the House, Representative Miles Allgood of Alabama stated:

Reference has been made to a contractor from Alabama who went to New York with bootleg labor. This is a fact. That contractor has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country.

74 CONG. REC. H6513 (1930-31).

As repugnant as this language may be, the issues of discriminatory motivation and impact are not at issue in this Comment. These are issues for another day.

This Comment argues that ERISA preempts Wisconsin’s Prevailing Wage Laws. Part II of this Comment examines the scope of ERISA’s preemption clause. Part III analyzes the recent case law finding preemption of substantially similar state prevailing wage laws. Finally, this Comment applies Parts II and III to Wisconsin’s Prevailing Wage Laws in order to demonstrate how these laws have been preempted by ERISA.

II. ERISA PREEMPTION

ERISA was designed as “a comprehensive statute to promote the interests of employees and their beneficiaries in employee benefit plans.”

Employees’ interests are protected “through substantive requirements imposed upon pension plans relating to participation, funding, and vesting, . . . and through uniform procedural standards for reporting, disclosure, and fiduciary responsibilities for both pension and welfare plans . . . .”

ERISA defines an “employee welfare benefit plan” as

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits . . . .

Likewise, an “employee pension benefit plan . . . mean[s] any plan, fund, or program which . . . provides retirement income to employees.”

ERISA’s preemption clause states that ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee

19. See infra Part III for a discussion of these cases.
23. Id. § 1002(2)(A)(i).
benefit plan” covered by ERISA.\textsuperscript{24} Congress intended ERISA’s preemptive scope to be as broad as its language suggests.\textsuperscript{25} The Supreme Court has noted that “[t]he pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that ‘relate[s] to’ an employee benefit plan governed by ERISA.”\textsuperscript{26}

The key question in ERISA preemption cases is whether the state law in question relates to an ERISA benefit plan. A state law relates to an employee benefit plan if it has a connection with or reference to such a plan.\textsuperscript{27} Under this “broad common-sense meaning,”\textsuperscript{28} a state law may relate to a benefit plan and, therefore, be preempted even if the law is not specifically designed to affect such plans (the effect is only indirect).\textsuperscript{29} “Such a connection exists where a state law prescribes either the type and amount of an employer’s contributions to a plan, the rules and regulations under which the plan operates, or the nature and amount of the benefits provided thereunder.”\textsuperscript{30}

ERISA’s preemption clause has been broadly construed to displace all state laws within its sphere, including those that are consistent with its substantive guidelines, because even indirect state action may encroach upon the area of exclusive federal concern.\textsuperscript{31} “Thus, even a state law enacted to further ERISA’s purposes may not be saved if it comes within the broad scope of the preemption clause.”\textsuperscript{32}

\textbf{III. DEVELOPING CASE LAW}

Neither the United States Supreme Court, the Wisconsin Supreme Court, nor the Wisconsin Court of Appeals have handed down a decision on this issue. In addition, there are no Seventh Circuit decisions to turn

\begin{itemize}
\item \textsuperscript{24} Id. § 1144(a) (emphasis added).
\item \textsuperscript{25} \textit{Shaw}, 463 U.S. at 98.
\item \textsuperscript{26} FMC Corp v. Holliday, 498 U.S. 52, 58 (1990).
\item \textsuperscript{27} Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) (citations omitted).
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} General Elec. Co. v. Department of Labor, 891 F.2d 25, 29 (2d Cir. 1989) (citations omitted).
\item \textsuperscript{31} Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).
\end{itemize}
to for guidance. Due to the lack of precedent, this Comment looks to persuasive authority from those jurisdictions that have dealt with the preemption of prevailing wage laws by ERISA to determine whether ERISA would preempt Wisconsin’s Prevailing Wage Laws.

Recently, three federal courts and two midwestern state courts have ruled that ERISA preempted state prevailing wage laws that are substantially similar to Wisconsin’s laws because the laws related to employee benefit plans. Although other courts have found varying prevailing wage laws were not preempted by ERISA, those laws differ greatly from Wisconsin’s Prevailing Wage Laws.33

A. Associated Builders & Contractors v. Perry

In Associated Builders & Contractors v. Perry,34 the Eastern District of Michigan found that Michigan’s Prevailing Wage Act had been preempted by ERISA.35 Of all the recent cases, Perry is the most significant because Michigan’s former law closely resembles Wisconsin’s Prevailing Wage Laws. Some of the reasons the court gave for preemption was: The Act “necessitated an ongoing administrative scheme to regulate the level of fringe benefits under ERISA-covered plans,”36 the Act “impermissibly permitted an employer’s benefit plans to be subjected to conflicting requirements,”37 and, the Act itself

33. See Minnesota Chapter of Associated Builders & Contractors, Inc. v. Minnesota Dept. of Labor & Indus., 47 F.3d 975, 978 (8th Cir. 1995) (failing to see the correlation between employee “benefits” and “benefit plans,” the court held that although the prevailing wage law “undisputedly” referred to benefits, it did not refer to any benefit plan and, therefore, was not preempted); Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley, 37 F.3d 945, 957-58 (3d Cir. 1994) (holding that the prevailing wage law did not mandate inclusion of a benefits component in the determination of a prevailing wage); WSB Elec., Inc. v. Curry, Nos. C90-00771CW, C90-01109CW, 1994 WL 446039 at *11e (N.D. Cal. Aug. 11, 1994) (relying on a dissenting opinion from another circuit, the court held that the prevailing wage law did not interfere with the administrative functions of ERISA plans) aff’d, 88 F.3d 788 (9th Cir. 1996); Associated Builders & Contractors v. Curry, 797 F. Supp. 1528, 1532-38 (N.D. Cal. 1992) (contradicting a prior decision, the court held that the determination of prevailing wage rates was within the state’s exercise of its traditional police powers), vacated, 68 F.3d 342 (9th Cir. 1995); Jay R. Reynolds, Inc. v. Department of Labor & Indus., 661 A.2d 494 (Pa. Commw. Ct. 1995) (deferring to the Third Circuit’s Keystone decision).

35. Id. at 1254.
36. Id. at 1246-47.
37. Id. at 1249.
referred to ERISA plans.\textsuperscript{38}

The \textit{Perry} court stated that a state law “relates to,” and is, therefore, preempted, if it “dictates and restricts the choices of ERISA plans with regard to reporting and administration.”\textsuperscript{39} The \textit{Perry} court found that the Act imposed administrative burdens on employers that dictated reporting and administrative requirements of ERISA plans for three reasons.\textsuperscript{40} First, “the Act required contractors and subcontractors to keep accurate records of the name, occupation, and actual wages and fringe benefits paid to each worker employed on each prevailing wage project.”\textsuperscript{41} These records had to be made available for inspection by the contracting agent and the Michigan Department of Labor.\textsuperscript{42}

In addition, the Act “required that employers submit their fringe benefit plans in writing if they wished to receive credit for those plans toward the prevailing fringe benefit obligation.”\textsuperscript{43} The court found that this requirement was “stricter than the minimum requirement utilized by federal courts to determine the existence of ERISA plans.”\textsuperscript{44} Finally, the Act required “employers to calculate the wages and benefits paid on an other-than-hourly basis toward the prevailing benefit obligation.”\textsuperscript{45}

As a result, the court found that the Act directly regulated, and, therefore, related to, ERISA plans by “enforcing reporting and disclosure requirements, establishing rules for the calculation of benefits to be paid, and imposing remedies for alleged misconduct arising from the administration of plans.”\textsuperscript{46}

Secondly, the court found the Act was preempted because it subjected an employer’s benefit plans to conflicting administrative requirements.\textsuperscript{47} In doing so, the court relied on the Supreme Court’s decision in \textit{Fort Halifax Packing Co. v. Coyne},\textsuperscript{48} which stated that:

Obligating the employer to satisfy the varied and perhaps

\begin{footnotes}
38. \textit{Id.} at 1249-50.
39. \textit{Id.} at 1248 (citations omitted).
41. \textit{Id.}
42. \textit{Id.}
43. \textit{Id.}
44. \textit{Id.}
45. \textit{Id.}
47. \textit{Id.}
\end{footnotes}
conflicting requirements of particular state [] laws . . . would make administration of a nationwide plan more difficult . . . . Such a situation would produce considerable inefficiencies, which the employer might choose to offset by lowering benefit levels . . . . "ERISA’s comprehensive preemption of state law was meant to minimize this sort of interference with the administration of employee benefit plans," [] so that employers would not have to "administer their plans differently in each State in which they have employees."49

The Perry court realized that if the Michigan Act and similar laws were upheld, various states could "enact differing prevailing wage laws with dissimilar administrative requirements."50 Allowing such laws to stand would "impair the ability of a[n ERISA] plan to function simultaneously in a number of states."51 The Act was preempted because the inconsistency of regulations that the Act could present to employers was "within the preemptive intent of Congress to assure that ERISA plans are governed by a single set of federal regulations."52

Finally, the Perry court ruled that the Act was preempted because it referred to ERISA plans.53 The court relied on the Supreme Court’s ruling in District of Columbia v. Greater Washington Board of Trade,54 in which the Court held that a District of Columbia statute was preempted solely because it referred to benefit plans regulated by ERISA.55 Specifically, the Michigan Act validated contributions for fringe benefits only "if the payments are communicated in writing to the [workers] and are pursuant to an identified fund, plan, or program."56 Thus, the court held that the statute referred to ERISA plans and, therefore, was preempted.57

49. Perry, 869 F. Supp. at 1249 (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10 (1987)).
50. Id.
51. Id. (citations omitted).
52. Id. (quoting Associated Builders & Contractors v. Baca, 769 F. Supp. 1537, 1548 (N.D. Cal. 1991)).
53. Id. at 1249-50.
56. Id. at 1249 (emphasis in original).
57. Id. at 1250.
B. Associated Builders & Contractors v. Baca

In Associated Builders & Contractors v. Baca, the Northern District of California considered a prevailing wage law that imposed payment of prevailing wages upon employers for certain public and private works projects. The amount of the prevailing wages was defined in part by the monetary value of fringe benefits. The court found ERISA preemption because (1) the law imposed upon employers the administrative burden of calculating the value of benefits provided; (2) the law had a disproportionate impact on the benefits of the employee; and (3) the law complicated the administration of a nationwide benefit plan, producing inefficiencies that employers might offset with decreased benefits.

The court found that the prevailing wage law created an ongoing administrative system with regard to employee benefits:

If an administrative scheme were required merely to pay wages, but not other benefits, ERISA preemption would not be implicated. However the definition of [prevailing] wages necessitates reference to, and calculation of, employer contributions to employee benefit plans. Thus, the wage requirement incorporates employee benefits into the prevailing wage statute. This incorporation can only be accomplished by requiring [prevailing] wages that “refer to” and “regulate” employee benefit plans.

The court then concluded that:

Employers will be forced to implement an administrative scheme to calculate on a regular basis the wages and benefits paid to individual workers on projects covered by the [prevailing wage laws]. Those contractors will be required to determine the cash equivalent of the benefits provided. At a minimum, employers will be forced to calculate wages and benefits on covered projects separately from other projects, creating an ongoing administrative

59. Id. at 1546.
60. Id. at 1546-47.
61. Id. at 1547-48.
62. Id. at 1548.
63. Id. at 1547.
Consequently, the court held that the prevailing wage law was preempted by ERISA. The prevailing wage law was also preempted by ERISA because it had a disproportionate impact on the benefits of employees. The court relied upon General Electric Co. v. Department of Labor, in which the Second Circuit "noted that the payment of the equivalent cost of fringe benefits to the employee may be of lesser value to the employee than the benefits themselves." The Second Circuit determined that the statute related to ERISA plans and was, therefore, preempted.

The Baca court held that the law related to and regulated ERISA plans because it provided for "employer compliance through the payment of benefits or the cash equivalent." The court noted that the alternate provisions for compliance created a disproportionate impact on employees, and thus regulated ERISA benefits "by altering the calculation or payment of benefits under ERISA covered plans." In addition, the Baca court found that the law not only "implicate[d] Congress' desire to avoid a patchwork of state regulation, it also imposed differing requirements on employers within a single state or locality." According to the court, "[e]mployers will be faced with the choice of: (1) setting up separate benefit plans for employees on covered projects; (2) adjusting participation in existing plans to compliance levels; or (3) abandoning ERISA benefit plan[s] altogether." The court found that each of these alternatives illustrated the extent to which the law related to and "purported to regulate" ERISA benefit plans: "[t]he inconsistencies and burdens created by this local legislation is [sic] within the preemptive intent of Congress to assure that ERISA plans are

---

64. Baca, 769 F. Supp. at 1547.
65. Id.
66. Id. at 1547-48.
67. 891 F.2d 25 (2d Cir. 1989).
68. Baca, 769 F. Supp. at 1547 (citing General Electric Co. v. Dep't of Labor, 891 F.2d 25, 28-31).
69. Baca, 794 F. Supp. at 1547 (citing General Electric, 891 F.2d at 28-31).
70. Id.
71. Id. at 1547-48.
72. Id. at 1548.
73. Id.
governed by a single set of federal regulations." Therefore, the court held that the prevailing wage law was preempted by ERISA to the extent that it undermined this goal of uniformity.

C. General Electric v. Department of Labor

In General Electric Co. v. Department of Labor, the Second Circuit reviewed a New York prevailing wage law requiring ex-locality employers to bring "supplements," i.e., fringe benefits, into conformity with those prevailing in the locality or to make up the difference in cash payments. The court ruled that a state law relates to a benefit plan if it prescribes either (1) "the type and amount of an employer's contributions to a plan, (2) the rules and regulations under which the plan operates, or (3) the nature and amount of benefits provided under a plan."

The court held that the law intruded into all three of the preempted areas. First, the law required employers to bring their benefit plans into conformity with those prevailing in the locality or to make up the difference through cash payments to their employees. Second, "the employer was required to keep, and on request to file with the State, sworn schedules of supplements and hours of labor available for inspection by a state fiscal officer." Finally, "[i]n the event the employer fails to bring a plan into conformity, . . . the employee may be required to accept cash payments based on what the employer's cost would have been to accomplish conformity." These payments may have been of lesser value to the employee than the unpaid benefits. Accordingly, the court concluded that the New York prevailing wage law clearly related to employee benefit plans and was consequently preempted by ERISA.

74. Id.
75. Id.
76. 891 F.2d 25 (2d Cir. 1989).
77. Id.
78. Id. at 29.
79. Id.
80. Id.
81. Id.
82. General Elec., 891 F.2d at 30.
83. Id. at 30.
D. City of Des Moines v. Master Builders of Iowa

In *City of Des Moines v. Master Builders of Iowa*, the Supreme Court of Iowa reviewed a Des Moines ordinance that established a prevailing wage requirement for public improvement projects. The court noted that "[a]t a minimum, state laws that (1) make specific reference to, or (2) are specifically designed to affect, employee benefit plans are preempted." The ordinance mandated that "all construction contractors and subcontractors on city public improvement projects [competitively bid] to pay not less than the current prevailing wage rates, as determined and fixed by the U.S. Department of Labor pursuant to the Davis-Bacon Act." This requirement was later phrased in the ordinance as a requirement "to pay . . . not less than the current applicable prevailing wage and fringe benefits, as published in the Federal Register . . . ." The court concluded that the benefit plans established for "employees of prospective contractors were implicated, bringing the process within the scope of ERISA preemption; [and that] [t]his [was] an area reserved for federal authorities alone, and outside the authority of the city of Des Moines."


In *Construction & General Laborers’ District Council v. James McHugh Construction Co.*, the Appellate Court of Illinois reviewed the Illinois Prevailing Wage Act, which defined the prevailing wage as "the hourly cash wages plus fringe benefits for health and welfare, insurance, vacation and pensions generally." This court adopted the test set out above in *General Electric* and found that the Wage Act was

---

84. 498 N.W.2d 702 (Iowa 1993).
85. *Id.* at 705 (quoting Des Moines, Iowa ordinance 11,653 § 18-64).
86. *Master Builders*, 498 N.W.2d at 705 (quoting Des Moines, Iowa ordinance 11,653 § 18-64).
87. *Id.*
88. *Id.* at 705-06.
90. *Id.* at 20 (quoting ILL. REV. STAT. ch. 48, para. 39s-2 (1989)).
preempted by ERISA.\textsuperscript{91}

The Illinois court held that the "ERISA preemption [was] triggered by not just any indirect effect on administrative procedures, but rather by an effect on the primary administrative functions of benefits plans, such as determining an employee's eligibility for a benefit and the amount of that benefit."\textsuperscript{92} The court concluded that although the claim was one for "wages" only, those wages were based upon fringe benefit contributions for health, welfare, insurance, vacation, and pensions, which were well "within the purview of ERISA."\textsuperscript{93}

IV. WISCONSIN'S PREVAILING WAGE LAWS

The determinative issue governing whether Wisconsin's Prevailing Wage Laws ("the Wage Laws") have been preempted by ERISA is whether they "relate to" employee benefit plans. ERISA has preempted the Wage Laws because they relate to ERISA plans in five ways: (1) they set forth administrative requirements on employee benefit plans; (2) they require a wage rate calculation that includes employee benefits; (3) they refer to ERISA plans; (4) they impair the uniform objective of ERISA; and (5) they have a disproportionate impact on employee benefit plans.

A. Administrative Requirements

The strongest argument in favor of preemption is that the Wage Laws create administrative burdens on employers with regard to employee benefit plans. A state law relates to an ERISA plan if it sets forth administrative and reporting requirements for employee benefit plans.\textsuperscript{94} Under the Wage Laws, employers must comply with administrative recordkeeping and reporting statutes and regulations as they relate to employee benefit plans.\textsuperscript{95}

ERISA's preemption clause encompasses a broad definition of state law to include "all laws, decisions, rules, regulations, or other [s]tate

\textsuperscript{91} James McHugh Constr. Co., 596 N.E.2d at 22.
\textsuperscript{92} Id. at 23.
\textsuperscript{93} Id. at 24-25.
\textsuperscript{95} See Wis. STAT. §§ 66.293, 103.49 (1993-94).
The Wage Laws direct the Department of Workforce Development ("the Department") to promulgate rules to administer the statutes. This is precisely what the Department has done through Chapters Ind. 90 and 92 of the Wisconsin Administrative Code, which apply to municipal and state contracts, respectively.

The regulations established by the Department reiterate the statutes' language that the prevailing wage rate is determined by adding the hourly basic rate plus the hourly contributions for economic or fringe benefits. Furthermore, both the statutes and regulations require employers to maintain records regarding wages and fringe benefits.

Specifically, the Wage Laws require employers to keep records "indicating the name and trade or occupation of every laborer, workman or mechanic employed ... in connection with the project and an accurate record of the number of hours worked by each employee and the actual wages paid therefor." Implicit in this recordkeeping requirement is that wages paid include an accurate record of employer contributions to employee benefit plans, pursuant to the statutory definition that wages include the hourly basic rate plus the hourly contributions for benefits. As a result, employers are required to keep track of the hourly dollar value of each benefit provided to each and every employee on each individual construction project.

Additionally, these records must be made available to the Department upon request for inspection. The statutes provide that the Department "may demand ... copies of any payrolls and other records and information relating to the wages paid laborers, workmen or mechanics" to ensure compliance with the prevailing wage laws. Thus, in order to prove compliance, an employer must keep an accurate record of all contributions to employee benefit plans.

The statutes also mandate that upon completion of a project and

98. Wis. Admin. Code §§ Ind. 90.01(7), 92.01(6) (1990).
101. Id. §§ 66.293(3)(i), 103.49(5).
102. See id. § 66.293(3)(i).
103. Id.; see id. § 103.49(5).
prior to receiving final payment, each employer must file an affidavit with the applicable municipality stating that the employer is in compliance with the requirements of the Wage Laws and that the employer has received similar evidence of compliance from all of its agents and subcontractors. In addition, no municipality may authorize final payment to an employer until the affidavit is filed.

The regulations set forth by the Department require even greater recordkeeping and production of records than mandated by the statutes. Both Chapters Ind. 90 and 92 of the Wisconsin Administrative Code provide a broad mandate to the Department regarding the collection of wage rate information: “For purposes of making wage determinations the department shall conduct a continuing program for the collection and compilation of wage rate information.” More specifically, the regulations state that “[n]o type of economic or fringe benefit is eligible for consideration as a so-called unfunded plan unless . . . [a] copy has been supplied to the department.” In addition, the Chapters state that “[u]nconventional [employee benefit] plans must be approved by the department before credit will be given for costs under [the prevailing wage laws].” These regulations place tremendous burdens on the administration of employee benefit plans.

Finally, both Chapters Ind. 90 and 92 require inspection of wage records by the Department. The regulations state that:

Every employer shall keep and, upon request of the department or the contracting municipality, promptly furnish copies of any or all payrolls and records relating to work done, hours worked, and wages paid . . . and shall allow the department to examine original records relating to any and all work as required by [the prevailing wages laws].

Clearly, the administrative recordkeeping and reporting requirements in the Wage Laws relate to employee benefit plans, and, therefore, fall under the type of state law Congress intended to be preempted by ERISA.

104. WIS. STAT. § 66.293(3)(h).
105. Id.
106. WIS. ADMIN. CODE § Ind. 90.015; see also id. § Ind. 92.015.
107. Id. at §§ Ind. 90.01(8)(2), 92.01(8)(c)2 (1990).
108. Id. at §§ Ind. 90.04(2), 92.04(2) (1990).
109. Id. at §§ Ind. 90.07, 92.07 (1990).
B. Wage Rate Calculation

Obviously, if the Wage Laws only regulated monetary wages paid to employees, they would not be preempted by ERISA. Indeed, such minimum wage statutes are common. However, when "wages" paid under the Wage Laws include fringe benefits contributed by an employer, the Wage Laws relate to ERISA and are, therefore, preempted.

Similar to the prevailing wage rate statutes at issue in Associated Builders & Contractors v. Baca\textsuperscript{110} and Construction & General Laborer's District Council v. James McHugh Construction Co.,\textsuperscript{111} Wisconsin's Prevailing Wage Laws require employers and the Department to determine the prevailing wage rate by adding "the hourly basic rate paid plus the hourly contribution for health and welfare benefits, vacation benefits, and any other economic benefit."\textsuperscript{112} The court in \textit{Baca} held that this type of a calculation of this type was precisely the type of requirement that related to employee benefit plans, thereby requiring preemption under ERISA.\textsuperscript{113}

The \textit{Baca} court held "the definition of [prevailing] wages necessitates reference to, and calculation of, employer contributions to employee benefit plans . . . . Thus, the wage requirement incorporates employee benefits into the prevailing wage statute. This incorporation can only be accomplished by requiring [prevailing] wages that 'refer to' and 'regulate' employee benefit plans."\textsuperscript{114} The court noted that "[a]t a minimum, employers will be forced to calculate wages and benefits on covered projects separately from other projects, creating an ongoing administrative system."\textsuperscript{115} As a result of this wage calculation, the prevailing wage rate resolutions and ordinance were held to be preempted by ERISA.\textsuperscript{116}

The Illinois statute at issue in \textit{James McHugh Construction Co.}\textsuperscript{117}

\textsuperscript{112} Wis. STAT. § 103.49(1) (d) (1993); \textit{see also} id. § 66.293(3).
\textsuperscript{113} \textit{Baca}, 769 F. Supp. at 1547.
\textsuperscript{114} \textit{Id}.
\textsuperscript{115} \textit{Id}.
\textsuperscript{116} \textit{Id}.
\textsuperscript{117} 596 N.E.2d at 23-24.
similarly defined wages as "the hourly cash wages plus fringe benefits for health and welfare, insurance, vacation and pensions generally."\textsuperscript{118} This definition is virtually identical to the Wage Laws.\textsuperscript{119} Furthermore, the Illinois Court of Appeals reasoned that, although the claim was one for "wages" only, "those wages [were] based upon fringe benefit contributions for 'health, welfare, insurance, vacation, and pensions,' within the purview of ERISA."\textsuperscript{120}

Accordingly, because the Wage Laws also define wages as the "hourly basic rate paid plus the hourly contribution for health and welfare benefits, vacation benefits, pension benefits and any other economic benefit,"\textsuperscript{121} they have been preempted by ERISA.

\textbf{C. Reference to ERISA Plans}

The Wage Laws are also preempted because they refer directly to employee benefit plans regulated by ERISA. When a state law refers to employee benefit plans regulated by ERISA, it is generally preempted on that basis alone.\textsuperscript{122}

The Wage Laws validate contributions for fringe benefits provided the benefits "be made pursuant to a bona fide fund, plan or program."\textsuperscript{123} The Perry court stated that this language, by itself, referred to ERISA-covered employee benefit plans, and was grounds alone for preemption.\textsuperscript{124} For the same reasons, Wisconsin's Prevailing Wage Laws are preempted.

Moreover, Wisconsin's statutory language goes a step further. The Wage Laws explicitly define "fund, plan or program" as "the various types of arrangements commonly used to provide economic and fringe benefits through employer contributions."\textsuperscript{125} The Wage Laws also refer to employee benefit plans when describing the type of non-prevailing

\begin{footnotes}
\item[118] Id. at 20 (quoting ILL REV. STAT. ch. 48, para. 39s-2 (1989)).
\item[119] WIS. STAT. § 103.49(1)(d) (1993-94).
\item[120] \textit{James McHugh Constr.}, 596 N.E.2d at 23-24.
\item[121] See WIS. STAT. § 103.49(1)(d) (1993-94).
\item[123] WIS. ADMIN. CODE §§ Ind. 90.01(9)(b), 92.01(8)(b) (1990) (emphasis added).
\item[124] Perry, 869 F. Supp. at 1249.
\item[125] WIS. ADMIN. CODE §§ Ind. 90.01(9)(b), n.3, 92.01(8)(b) n.3 (1990).
\end{footnotes}
plans for which an employer may get credit for implementing.\textsuperscript{126} Accordingly, the Wage Laws explicitly refer to ERISA plans and are probably be preempted.

\textbf{D. Impairment of ERISA's Uniform Objective}

ERISA's uniform standards regarding the administration and enforcement of employee benefit plans prevent a patchwork of state and local regulation that would place enormous burdens on employers. This is exactly the type of problem that Congress intended to alleviate with ERISA's broad preemption clause.\textsuperscript{127}

The United States Supreme Court has addressed Congress' broad preemptive intent:

An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations . . . . The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States.\textsuperscript{128}

The Court then concluded:

It is thus clear that ERISA's preemption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.\textsuperscript{129}

Allowing Wisconsin, other states, or municipalities to enforce distinct prevailing wage laws would subject employee benefit plans to conflicting administrative requirements. Congress intended to prevent states from

\textsuperscript{126} \textit{Id.} §§ Ind. 90.04(1)(b), 92.04(1)(b).
\textsuperscript{127} Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9-11 (1987).
\textsuperscript{128} \textit{Id.} at 9.
\textsuperscript{129} \textit{Id.} at 11.
enacting laws with varying administrative requirements for employee benefit plans. \(^{130}\) "Allowing such laws to stand would 'impair the ability of a[n ERISA] plan to function simultaneously in a number of states.'"\(^ {131}\)

Prevailing wage laws that relate to employee benefit plans not only subject employers to differing administrative requirements from state to state, but within the state as well. As the *Baca* court recognized, local legislation could also impose differing requirements on employers within a single state.\(^ {132}\) Additionally, these alternatives regulate ERISA plans in a manner that may harm employees and create inefficiencies in the administration of ERISA plans on a national, state, and local level.\(^ {133}\)

For example, a multi-state contractor may wish to implement a nationwide employee benefit plan in the form of health insurance, whereby the employer contributes $1.00 an hour towards the plan. Hypothetically, in Milwaukee, Wisconsin, the Department may call for an employer contribution of $1.20 an hour for health benefits, while in Madison, Wisconsin, $0.90 an hour may be required. Additionally, in Atlanta, Georgia, the prevailing wage law may call for $1.45 an hour to be contributed, while in Reno, Nevada, $0.85 may be demanded. As a result, the employer will be forced to adjust its plan from state to state or municipality to municipality, incredibly impairing the ability of its employees' benefit plan to function simultaneously in multiple states.

Congressional intent for uniform regulation and administration of employee benefit plans has been seriously impaired by the enforcement of Wisconsin's Prevailing Wage Laws. The Wage Laws impose precisely the type of administrative burdens that ERISA's broad preemption clause aimed to alleviate.

**E. Disproportionate Impact on Employee Benefit Plans**

The Wage Laws state that an employer may provide the prevailing benefits or pay the cash equivalent cost of fringe benefits to an
employee. According to the General Electric Co. v. Dep't. of Labor and Baca courts, paying the cash equivalent cost of fringe benefits may have a disproportionate impact on employee benefits because the cash equivalent may be of lesser value to the employee than the benefits themselves. As a result, both courts ruled that because the wage laws had disproportionate effects on employees, they related to ERISA plans by altering the calculation or payment of benefits under ERISA-covered plans.

Accordingly, the Wage Laws also have a disproportionate impact on employee benefits and therefore have been preempted.

V. CONCLUSION

The Wisconsin Prevailing Wage Laws clearly "relate to" employee benefit plans as they create unnecessary burdens on the administration of these benefit plans. The Wage Laws include employee benefits in the calculation of prevailing wage rates and directly refer to ERISA-covered plans. In addition, the Laws seriously impair the ability of an employee benefit plan to function simultaneously in multiple states or municipalities. Finally, the Wage Laws may have a disproportionate impact on employee benefit plans because the cash equivalent of fringe benefits, which the Wage Laws allow an employer to pay, may be of lesser value to the employee than the benefits themselves. All of these distinctions run directly, contrary to the congressional intent of ERISA.

When this issue is ultimately presented before the courts, the judiciary should follow the precedent set by the courts of New York, California, Michigan, Illinois, and Iowa and rule that the Wage Laws also relate to ERISA plans and, therefore, have been preempted.

BRADLEY C. FULTON

---

134. See Wis. ADMIN. CODE §§ Ind. 90.04, 92.04 (1990).
135. 891 F.2d 25, 28-31 (2d Cir. 1989).
136. 769 F. Supp. at 1547.
137. General Electric, 891 F.2d at 28-31; Baca, 769 F. Supp. at 1547.

* The author wishes to thank Jon P. Axelrod and Stephen A. DiTullio for their ideas, support, and encouragement while developing this project.