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COMMENT

CONFLICTING DEMANDS MEET CONFLICT OF LAWS:
ERISA PREEMPTION OF WISCONSIN’S FAMILY
AND MEDICAL LEAVE ACT

GABRIELLE LESSARD*

Working people experience conflicts between their personal and family needs and the demands of their work. In recognition of this dilemma, Wisconsin’s legislature has enacted the Wisconsin Family and Medical Leave Act. The WFMLA is a comprehensive statute that provides job-protected leave to workers who are disabled by medical problems or need to care for family members. The Act is an important response to working people’s needs for state enforcement of reasonable employment conditions. WFMLA, however, is in danger of being preempted by the federal Employee Retirement Income Security Act of 1974. This potential does not arise from a conflict between WFMLA’s provisions and ERISA’s, but because ERISA’s unusually broad preemptive effect extends to all state laws that “relate to” employee benefit plans. ERISA’s preemption provision, however, has several exceptions that acknowledge the policy soundness of reserving to the states their traditional regulation of reasonable employment conditions. Consistent with these exceptions, ERISA should be amended to exempt state family and medical leave legislation from preemption.

I. INTRODUCTION

In April of 1988, the Wisconsin Legislature responded to the needs of the state’s working families by enacting the Wisconsin Family and Medical Leave Act (The Act, WFMLA).1 The Act was the legislature’s response to the difficulties working people face in managing the conflicting demands of work and family, and the heightened difficulties faced by

* J.D: 1992, University of Wisconsin. I would like to thank the many people who generously shared their time, information and insights, particularly Susan Brehm, Melanie Cohen, and Catherine Fisk.
the increasing numbers of families without a non-working parent. The Act provides Wisconsin workers uncompensated employment leave when they need to provide care to a family member with a serious health condition, have or adopt a child, or personally experience a serious health condition. The Act protects employees' jobs during their leaves, permits employees to substitute paid or unpaid leave provided by their employers for statutory leave, and requires employers to continue employees' group health insurance benefits while they are absent on leave.

In July of 1991, Wisconsin Department of Industry, Labor and Human Relations (DILHR) Equal Rights Division Administrative Law Judge John A. Grandberry held that a Wisconsin employer could properly deny its employees some rights guaranteed by the Act. Grandberry based his decision on his finding that the Act is preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA), which regulates pensions and other employee benefit plans.

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3. To qualify for the leave provided by the Act, employees must have worked for a qualified employer for at least one year, and have worked at least 1,000 hours for that employer in the preceding 12-month period. Wis. STAT. § 103.10(2)(c). Employers are not subject to the provisions of the Act unless they employ at least fifty persons on a permanent basis. Wis. STAT. § 103.10(1)(c) (Supp. 1991).

4. The Act provides employees up to two weeks of leave per year to care for a child, spouse or parent disabled by a serious health condition. Wis. STAT. § 103.10(3) (Supp. 1991).

5. The Act grants qualified employees up to two weeks of unpaid leave per year to be taken when they experience serious health conditions. Wis. STAT. § 103.10(4). Serious health condition is defined in the Act as "a disabling physical or mental illness, injury or impairment involving ... [i]npatient care in a hospital ... nursing home ... or hospice ... [o]utpatient care that requires continuing treatment or supervision by a health care provider." Wis. STAT. § 103.10(1)(g) (Supp. 1991).


preempts all state laws that "relate to" the employee benefit plans it governs.\footnote{11}

The case, \textit{Thompson v. Northwest Airlines, Inc.}, was brought by Mike Thompson, a Northwest Airlines machinist who sought to use family leave to care for his wife and young son after the birth of the couple's second child. To make his break in employment economically feasible, Thompson planned to substitute some of his accrued compensated sick leave for the uncompensated WFMLA leave.\footnote{12} When Northwest refused to grant Thompson's sick leave request, Thompson complained to DILHR, the Act's administering agency. Northwest responded that Thompson's request was unenforceable because ERISA preempted the Act. The company claimed that its sick leave was provided through an ERISA plan, and that the Act "related to" its ERISA plan in permitting sick leave substitution.\footnote{13} Judge Grandberry agreed with Northwest's assertions, finding that Northwest's sick leave benefits were provided through an ERISA employee benefit plan and that "[t]here can be no dispute that the Family and Medical Leave Act is a law which, in this case, 'relates to an employee benefit plan.'"\footnote{14}

The precedential value of Grandberry's decision is unclear.\footnote{15} The powers of Wisconsin Administrative Agencies are limited to those

\footnote{11. Preemption is based on the supremacy clause of the U.S. Constitution, U.S. \textsc{Const.} art. IV, cl. 2. Under the supremacy clause, if Congress has established an arena as exclusively subject to federal authority, state attempts to regulate the arena are invalid. \textit{Jones v. Rath Packing Co.}, 430 \textsc{U.S.} 519, 525 (1977). Preemption may be express or implied. Express preemption is effected by statutes, like ERISA, that expressly state Congress' intention to reserve their subject matter for federal regulation. Courts' analysis in express preemption cases is focused on interpreting the text of the preemption provision. \textit{See William J. Kilberg} & \textit{Paul D. Inman, Observation: Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514}, \textit{62 \textsc{Tex. L. Rev.}} 1313, 1315-16 (1984). Where Congress has not incorporated a direct expression of its preemptive intent, courts must determine whether state and federal laws conflict, either directly, or by frustrating Congress' intent to reserve an area to federal regulation. \textit{Florida Lime and Avocado Growers, Inc. v. Paul}, 373 \textsc{U.S.} 132, 142-43 (1963). Employee welfare benefit plans are defined at 29 \textsc{U.S.C.} § 1002(1) (1988).

12. \textsc{Wis. Stat.} § 103.10(5)(b) (Supp. 1991). For discussion of substitution see \textit{infra} text accompanying notes 33-36.


14. \textit{Id.}

15. While the \textit{Thompson} decision was pending, Northwest Airlines filed a suit against DILHR in the District Court for the Eastern District of Wisconsin, seeking a declaratory judgement that the Act was preempted by ERISA. The case was dismissed, with prejudice, by agreement of the parties. DILHR has agreed not to enforce the provision permitting substitution of sick leave against the Northwest plan, pending an appellate or Supreme Court decision that ERISA does not preempt the Act. Docket No. 90C1177 (E.D. Wis. 1991).}
expressly conferred by their enabling statutes. The Equal Rights Division’s authority is limited to enforcing the WFMLA and several other Wisconsin laws. Determining whether ERISA preempts a state law requires an interpretation of ERISA’s preemption clause, and is a question that arises under that federal law. Questions of federal law are beyond the competence of Equal Rights Division judges.

The potential is real, however, that competent courts will find that provisions of the WFMLA must fall to ERISA preemption. This Comment examines that potential as a case study in the overbreadth of ERISA preemption. It argues that ERISA preemption of state family leave legislation would be both harmful to the interests of working people and contrary to Congressional intent, and urges state legislatures to lobby Congress to amend ERISA to exempt state family and medical leave legislation from preemption.

Part II overviews the WFMLA’s provisions and purpose. Part III discusses the scope and effect of ERISA preemption, and how courts determine if state laws are preempted. Part IV considers the likelihood that the WFMLA is preempted, and discusses preemption-avoidance amendments. Part V argues that the Congress that enacted ERISA did not intend it to preempt state family and medical leave legislation, and advocates that ERISA’s preemption clause be amended with a family and medical leave law exception.

16. Village of Silver Lake v. Dept. of Revenue, 87 Wis. 2d 463 (1978). Agency enabling statutes are construed strictly "to preclude the exercise of a power which is not expressly granted." Id. at 468.

17. The Division was created and granted authority to enforce the Wisconsin Fair Housing and Equal Opportunity Acts in Wis. Stat. § 15.223 (Supp. 1991). The division’s authority was extended to include WFMLA enforcement with the passage of the Act; Wis. Stat. § 103.10(12) (Supp. 1991).


19. The potential for preemption is analyzed infra text accompanying notes 169-205.
II. WFMLA—An Overview

A. Balancing Work and Family Time

The WFMLA requires employers to grant qualified employees up to ten weeks of unpaid leave annually—six weeks of family parenting leave following the birth or adoption of a child; two weeks of family caretaking leave to provide care to a child, spouse or parent with a serious medical condition; and two weeks of medical leave for use when the employee is disabled by a serious health condition. The Act protects absent employees’ jobs, requiring employers to reinstate returning employees in their prior positions. If an employee’s job is not available when the employee returns from leave, the employer is required to place the returning employee in a position with equivalent compensation, benefits, hours and other terms of employment. The Act forbids employers to penalize employees for taking leave by reducing or denying their workplace benefits and creates administrative and civil causes of action for employees to use in enforcing their rights under the Act.

The Act’s leave is not reserved for use in times of major crisis. The post-birth or adoption parenting leave is intended to create a period for parent-child bonding. Like all leave that the Act provides, it is equally available to fathers and mothers. Medical and family caretaking leave

20. "Employer" is defined at Wis. Stat. § 103.10(1)(c) (Supp. 1991) as "... a person engaging in any activity, enterprise or business in (Wisconsin) employing at least 50 individuals on a permanent basis . . . ."

21. The Act "... only applies to an employee who has been employed by the same employer for more than 52 consecutive weeks and who worked for the employer for at least 1,000 hours during the preceding 52-week period." Wis. Stat. § 103.10(2)(c) (Supp. 1991).

22. Wis. Stat. § 103.10(3)(b) provides that the leave must begin within 16 weeks after the birth of a natural child or placement of an adoptive child. This leave is intended to be used for "bonding" between parents and their new children.


24. Wis. Stat. § 103.10(4) (Supp. 1991). Commentators have criticized the brevity of the leave provided by the WFMLA. See Donna Lenhoff & Sylvia Becker, Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach, 26 Harv. J. on Legis. 403, 433 (1989) (describing the WFMLA leave period as "seriously inadequate").


29. Plewa memo, supra note 2. The memo stated that the Act "will make bonding for new infants and adjustment periods for adopted children go easier, which will have long-term psychological benefits for children."

Wis. Stat. § 103.10(3)(b) (Supp. 1991) states that the leave is available to "employees," without qualification. Wis. Stat. § 103.10(3)(b) (Supp. 1991) requires
are available for both short-term disabling conditions and more serious medical problems.\textsuperscript{30}

The Act permits employees to schedule family leaves as partial absences from employment.\textsuperscript{31} Administrative regulations permit employees to take family or medical leave in non-continuous intervals, and, to take medical leaves as partial absences if their employers permit other leaves to be taken in increments of less than a full workday.\textsuperscript{32} These provisions make it possible for employees to share new child care with a partner, and to use leave while they or a family member receive a series of medical treatments.

The Act also permits employees to substitute leave provided by their employers for the statutory leave.\textsuperscript{33} This includes paid, as well as unpaid, leave\textsuperscript{34} and leave that is provided for purposes unrelated to family or medical needs.\textsuperscript{35} Administrative regulations limit the provision to the substitution of leave that has accrued to the employee, and forbid employers to require leave substitution.\textsuperscript{36}

parenting leave to begin within 16 weeks of the child’s birth or adoptive placement. By permitting a brief lapse between the child’s birth or placement and the commencement of the leave, the Act accommodates situations in which the child is hospitalized for several weeks after its delivery, or in which the parents wish to take leaves consecutively and extend the time that the child is with a parent.

\textsuperscript{30} See M.P.I. Wis. Machining v. DILHR, 159 Wis.2d 79 (Wis. Ct. App. 1990). The leave is available whenever an employee or qualified family member experiences a "serious health condition," defined as "a disabling physical or mental illness, injury, impairment or condition involving . . . [i]npatient care in a hospital . . . nursing home . . . or hospice or (o)utpatient care that requires continuing treatment or supervision by a health care provider." WIS. STAT. § 103.10(1)(g) (Supp. 1991).

Compare the Rhode Island Parental Leave Statute, which permits parents to take leave to care for seriously ill children and defines a seriously ill child as "a child under the age of eighteen who by reason of accident, disease or condition . . . is in imminent danger of death or . . . faces hospitalization involving an organ transplant, limb amputation or such other procedure of similar severity . . . ." R.I. GEN. LAWS § 28-48-1(e)(Supp. 1988). Given the two week duration of the Act’s medical leave, its effectiveness as a means of managing long-term serious conditions is questionable.

\textsuperscript{31} WIS. STAT. § 103.10(3)(d) (Supp. 1991). Partial leave permits employees to remain employed while they or a cared-for family member undergo a series of medical treatments.

\textsuperscript{32} WIS. ADMIN. CODE § IND 86.02 (Nov. 1989).

\textsuperscript{33} WIS. STAT. § 103.10(5)(b) (Supp. 1991).

\textsuperscript{34} Substitution of paid leave provides an employee with a substitute income source during her leave. An employee might wish to substitute unpaid leave in a case where her employer suspended her seniority or benefits accrual while she was absent on family or medical leave, but permitted benefits accrual during the substituted leave.

\textsuperscript{35} See Richland School District v. DILHR, Richland County Circuit Court, Case No. 89-CV-107 (April 20, 1990). The Richland School District court held that the Act’s substitution clause permitted an employee to use his accrued sick leave for a family leave following the placement of his adopted child.

\textsuperscript{36} WIS. ADMIN. CODE § IND 86.03(1).
B. Balancing Employer Interests

The Act contains several provisions that protect employers' interests. Small businesses are exempt from the Act's coverage, which is limited to state governmental employers and private employers with at least fifty permanent employees. New and less-than-half-time employees are likewise exempted. Only persons who have worked for a qualified employer for at least one year, and have worked more than 1,000 hours for that employer in the preceding year, are eligible to take leave. Several provisions restrict the use of leave by eligible employees. Employees scheduling non-emergency leave are required to consider their employers' needs, and to schedule their leave so that it does not "unduly disrupt" the employer's business operations. When possible, employees who intend to use leave are required to give their employers advance notice. Employers are permitted to guard against potential employee abuses by requiring their employees to provide certification of the employee's or family member's disabling medical conditions. These restrictions balance the reasonable interests of employers by ensuring that all employees use their leave benefits fairly.

37. WIS. STAT. § 103.10(1)(c)(1990) (Supp. 1991). Approximately 33% of Wisconsin employees work for companies that hire too few employees to be subject to the Act. (Author's calculation based on data from the Wisconsin Bureau of Labor Statistics, Department of Industry, Labor and Human Relations.)

38. WIS. STAT. § 103.10(2)(c) (Supp. 1991). Commentators have criticized length of service requirements as potentially excluding seasonal workers such as agricultural workers, and workers with limited-term appointments, such as some teachers. See Lenhoff & Becker, supra note 24, at 426.

39. WIS. STAT. §§ 103.10(3)(d), 103.10 (6)(b) (Supp. 1991). The administrative regulation that interprets these provisions states that:
   [an employee shall be deemed to have made 'a reasonable effort' to schedule a leave so that it does not unduly disrupt the employers' operations . . . (a) if the employee provides the employer with a proposed schedule for the leave with reasonable promptness after the employee learns of the probable necessity of the leave, and (b) Except where precluded by the need for health care consultation or treatment, if that proposal is sufficiently definite that the employer is able to schedule replacement employees . . . to cover the absence of the employee taking the leave.
   WIS. ADMIN. CODE § IND 86.02(5) (Nov. 1989).

40. WIS. STAT § 103.10(6)(b). The administrative regulation that accompanies this provision states that "[a]n employee shall be deemed to have given the employer advance notice . . . if the notice identifies the planned dates of the leave and is given to the employer by the employee with reasonable promptness after the employee learns of the probable necessity of the leave." WIS. ADMIN. CODE § IND 86.02(4)(a) (Nov., 1989).

41. WIS. STAT. § 103.10 (Supp. 1991).
C. Benefits Administration During Employee Leaves

Benefits administration is of significant concern in considering the likelihood of ERISA preemption because it is in this area that the Act arguably "relates to" employee benefits, creating the potential for preemption.\textsuperscript{42}

Employees using Act-provided leave are not entitled to the accrual of seniority or employment benefits during their absence.\textsuperscript{43} Employers, however, are required to continue employees' group insurance coverage during employees' leaves.\textsuperscript{44} The Act requires employers to maintain the coverage under the conditions that it was provided before the employee's leave began, and to continue making any premium contributions made before the leave if the employee's contributions continue.\textsuperscript{45}

The Act safeguards against employee abuse of this provision by permitting employers to require their employees to deposit funds equivalent to eight weeks of their group insurance premium into an escrow account. Employers are generally required to return the funds, with interest, to their employees at the end of their employment. In the event that an employee leaves his job within thirty days after completing a family or medical leave, the Act entitles his employer to deduct premiums paid during the employee's leave from the funds returned to the employee.\textsuperscript{46}

D. The Best of Legislative Intentions—WFMLA's Origins and Importance

The legislature enacted WFMLA to assist workers in handling conflicts between the demands of their work and the needs of their families.\textsuperscript{47} The Act's sponsors described its necessity as arising from the increased entry of women, the persons traditionally responsible for family caregiving work, into the paid workforce.\textsuperscript{48} The sponsors of the Act

\begin{footnotes}
\item[42] See infra text accompanying notes 169-205.
\item[47] In a press release issued in advance of the Family and Medical Leave Bill's introduction, sponsoring Senator John Plewa stated that "many people are caught between the pressures of parenthood and livelihood." Plewa also stated that the bill was needed because "Parents are finding it difficult to balance the demands of work and their duties as mothers and fathers." Plewa memo, supra note 2.
\item[48] Sponsoring Senator John Plewa testified before the Senate Committee on Agriculture, Health and Human Services that "[t]he traditional family in which the father works outside the home and the mother works inside the home accounts for only 15% of American families... In 1982, 56% of women with preschool children worked outside
\end{footnotes}
recognized that women's increased workforce participation resulted from
increases in the proportion of families that needed two income earners,
and was not a trend that could be reversed as other needs arose.\footnote{49}

The Act's sponsors also anticipated growth in future caretaking
needs, to arise from the increasingly large and needy elderly population.
Sponsoring Senator John Plewa testified at a Senate committee hearing

\begin{quote}
the home and they are the fastest growing segment of the labor force today." \textit{Wisconsin Family and Medical Leave Act: Hearings on SB Before the Senate Committee on Agriculture, Health and Human Services}, (Aug. 25, 1987) (testimony of Senator John Plewa) [hereinafter Plewa testimony].
\end{quote}

Lenhoff and Becker, note that the number of women in the workforce increased by
172\% between 1954 and 1987, compared to a 49\% increase in male workers. Lenhoff &
of Labor, Employment and Earnings} 159, at table 2 (1988).

This characterization of the "traditional" family fails to acknowledge the hardships
faced by the single mothers and lower-income women who have been caught between the
demands of supporting and caring for their families for generations. \textit{See Linda Gordon,
Heroes of Their Own Lives} 309, at Table II (1988), analyzing the extent to which men,
women and welfare contributed to the financial support of families served by the
It is true, however, that both working and nonworking women carry a disproportionate
share of their families' caretaking burdens. Lenhoff & Becker, supra note 24, at 405.

While the rhetoric advocating the WFMLA's passage relied on "traditional" notions
of women's roles and the division of family labor, the Act's provisions benefit men and
women equally. The Act's provisions benefit the "employee," defined as "an individual
employed in this state by an employer." \textit{Wis. Stat.} § 103.10(1)(b). This gender
neutrality, as well as the Act's accommodation of a variety of family caretaking needs,
maximizes the availability of family caretaking and reduces the potential that employers
will discriminate against women in the belief that they are more likely to use family leave
and be more expensive workers. Senator Plewa recognized this when he described
the proposed Act to the Senate Committee as "a complete family bill, a bill that covers three
generations: children, spouses and elderly parents." Plewa testimony, supra.

Family leave legislation that provides only for parenting ignores the needs of other family
members and the burdens imposed on the employees who meet those needs. It also creates
an incentive for employers to discriminate against employees perceived as likely to have

\footnote{49. Sponsoring Senator John Plewa stated in testimony before the Senate committee on Agriculture, Health and Human Services that "[w]omen, our traditional family care-givers, are working outside the home in increasing numbers . . . This dramatic change has not come about because women are abandoning their families, but because the American Dream now demands two incomes." Plewa testimony, supra note 48.}

Economists have likewise attributed the increase in dual income-carner families to a
decline in the real value of wages. \textit{See} Frank Levy, \textit{Dollars and Dreams: The
Changing American Income Distribution} 157 (1987). Levy notes that between the
years 1973 and 1984 the median income of working-aged men declined significantly, but
because of increased earnings from working wives the average income of husband-wife
families in the same age group declined only slightly.
that "[a]s our society ages and medical advances help increasingly frail elderly persons live longer, we will be called upon to provide greater care for our parents and spouses . . . . An aging society also needs a family leaves law."50 This assertion demonstrates that the sponsors of the WFMLA were concerned, not only with parenting needs, but with the broader spectrum of needs that accompany being human. The Act is, as Senator Plewa described it "a complete family [law] . . . ."51

Commentators who advocate family and medical leave legislation offer similar reasons for its importance. Donna Lenhoff, Legislative Director of the Women's Legal Defense Fund and her co-author, attorney Sylvia Becker, note that most families with children are maintained by a couple in which both partners work,52 or by a single parent.53 Yet, the authors observe, in many respects "our society continues to operate as if as if mothers stay at home to care for their children and fathers' wages are sufficient to support the entire family."54 Day care services are scarce, and often available only for children.55 Many services families need are available during working hours only.56 When families experience medical emergencies or other needs requiring a caretaker's response, an income earner often must lose time from work.57 In families that rely upon two incomes, or have only one income earner, the loss of income during this lost work time creates hardships. By permitting substitution of

50. Plewa testimony, supra note 48. Plewa continued, "[c]urrently, more than 2.2 million family members nationwide provide care for 1.6 million seriously impaired individuals over the age of 65 . . . . The federal government estimates that by 2025, Americans over 65 years of age will comprise 40% of the dependant care population."

Other sources document the growing number of family members experiencing elderly caregiving and work conflicts. A 1982 National Center for Health Services Research survey found approximately 2.2 million caregivers providing unpaid assistance to non-institutionalized elderly persons. Fifty-nine percent of caregivers responding stated that they experienced conflicts between their caregiving responsibilities and their employment. Caring for the Frail Elderly, A National Profile, National Center for Health Services Research (1982).

51. Plewa testimony, supra note 48 (the word "law" is substituted for "bill" in the original quote.) Wisconsin is one of only a few states that provide leave for the full compliment of parenting, family care and personal medical needs. See infra text accompanying notes 213-15.


54. Lenhoff & Becker supra note 24, at 405.
55. Id.
56. Id.
57. Id.
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compensated employer-provided leave, the WFMLA provides some workers a source of income to minimize the hardship of family or personal crisis.58

Devastating hardship can result when employees lose their jobs due to medical problems or family need conflicts. Since health care and insurance are frequently provided through employment, job loss often means that workers and their dependents lose access to health care at the time that they most need it. Workers who lose their jobs because of family or medical needs are out of the workforce longer than the duration of the problem, because they are generally unable to look for work until their family or medical needs are resolved.59 These workers' earnings are depressed for the duration of their careers, since they lose skills and seniority as a result of their job shifts.60

Society as a whole bears the costs of these workers' career disruptions, because their lost skills decrease the national economy's workforce productivity, and their financial needs increase the demands on public assistance programs.61 By keeping workers' jobs secure while they experience medical problems or attend to family needs, the WFMLA guards against these hardships.

The WFMLA is supported by sound state policy goals of ensuring reasonable working conditions and maintaining a productive workforce. The Act is important to, and for, Wisconsin's working families. A judicial finding that ERISA preemption invalidated the Act would be a serious injury to working people's interests.

E. Past Consideration of the Issue

The drafters of the WFMLA were aware that their bill was potentially preempted by ERISA. Sponsoring Senator John Plewa's office sought an analysis of the issue from the state office of the insurance


59. The costs experienced by workers, their families and society when job-protected leave is not provided are detailed in R. Spatler-Roth & H. Hartmann, Unnecessary Losses: Costs to Americans of the Lack of Family and Medical Leave, Institute (1990).

60. Id.

61. Spatler-Roth & Hartmann, supra note 59, at xi. The authors estimate that annual public assistance payments to persons who became unemployed while having children total $1.2 billion, to persons providing care to ill family members total $108 million, and to persons who become unemployed due to their own medical disability total $7.5 billion.
The insurance commissioner's office responded that it was unclear whether the family and medical leave provisions of the Act would be preempted, and that the continuation of insurance requirement would probably be at risk of preemption. The Act's legislative drafting file shows that Richard Sweet, an attorney from the Wisconsin Legislative Counsel, also raised the possibility that ERISA preempted the bill's continuation of insurance provisions.

Jeffrey Shampo, the bill's drafter, recalls that the participants thought about the possibility of preemption, but no changes were made because no one was able to state definitively whether the bill was preempted. The WFMLA's legislative drafting file confirms this account. None of the edits made to the bill during its development changed the Act's existing provisions in ways likely to decrease the potential of ERISA preemption.

62. Memorandum from Robert M. Elconin, Deputy Commissioner of Insurance, to Senator John Plewa (Oct. 21, 1987) (on file with Wisconsin Law Review). Elconin stated in the memo, "I understand that you had requested my office to research this issue. The memo concludes that it is presently unclear whether ERISA preempts the family or medical leave provisions of SB 235. ERISA, however, apparently does pre-empt SB 235's provisions concerning an employer's participation in or premium payments to a group health insurance policy while an employee is on leave."

63. Id.


65. Telephone interview with Jeffrey Shampo, Legislative Attorney, Wisconsin Legislative Reference Bureau (March 26, 1991).


66. The only reference to ERISA in the drafting file relates to a provision of the Family and Medical Leaves Bill that was eliminated for other reasons. See Jeffrey J. Shampo, Drafter's Note from the Wisconsin Legislative Reference Bureau (Feb. 28, 1988).

The note, by legislative attorney Jeffrey Shampo, states that "a state law requiring an employer to provide a 'cafeteria' [employee benefit] plan may be preempted by... [ERISA]." The note relates to Assembly Amendment 4 to the Family and Medical Leave bill (Senate Bill 235), which required employers to provide employees a flexible benefit package that included a family leave option. The amendment was dropped from the bill in a conference committee convened on March 23, 1988 to reconcile differing versions of the bill passed by the Assembly and the Senate.
III. ERISA Preemption

A. ERISA Generally

ERISA was enacted to safeguard working people’s interests. As interpreted by the courts, however, ERISA’s broad preemption provision has had the paradoxical effect of constraining states in their attempts to enhance their citizens’ well-being.67

Congress enacted ERISA to assist working people by securing their rights to benefits they had relied on receiving from their employers.68 Congress took this action in response to evidence of widespread fraud and abuse in employee pension and benefit plan management.69

ERISA guards against benefit management abuses by imposing a comprehensive, and complex, framework of requirements and standards on pension plan establishment, operation and administration.70 ERISA imposes reporting and fiduciary requirements on managers of both pension plans and other employee benefits provided through "employee welfare benefit plans."71 ERISA also provides a cause of action for workers whose rights to pension benefits are denied,72 and provides for public enforcement of its provisions.73

67. See, e.g., Ins. Bd. Under Social Ins. Plan of Bethlehem Steel Corp. v. Muir, 819 F.2d 408 (3d Cir. 1987); Holland v. National Steel Corp. 791 F.2d 1132 (4th Cir. 1986) (West Virginia law requiring employers to pay vacation benefits to laid-off employees preempted by ERISA); General Split Corp. v. Mitchell, 523 F.Supp 427(E.D. Wis. 1981) (Wisconsin law requiring employers to provide conversion benefits in employee health insurance plans preempted by ERISA); Standard Oil Co. of Cal. v. Agsalud, 633 F.2d 760 (9th Cir. 1980) (Hawaii law requiring employers to provide a minimum level of health insurance to employees preempted by ERISA).

68. ERISA’s declaration of policy clause states in part:

The Congress finds . . . that the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans . . . it is desirable in the interests of employees and their beneficiaries...that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans . . . .


70. 29 U.S.C. §§ 1051-1061, 1081-1086 (1988). ERISA does not require employers to provide any benefits, or otherwise regulate the contents of plans.


The requirements ERISA imposes on employee welfare benefit plan administration are skeletal in comparison to the comprehensive framework it creates for pension administration. The statute’s preemptive reach, however, is equally all-encompassing for laws affecting both pension and welfare benefit plans.


ERISA's section 514(a) expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ," with specified exceptions. The United States Supreme Court has commented on the unusually wide scope of this preemptive language, calling ERISA's preemption clause "conspicuous for its breadth," and "virtually unique." ERISA's preemptive reach extends beyond state laws that conflict with its provisions. ERISA, as interpreted by the courts, preempts state laws and causes of action that complement its provisions, such as fraud or breach of contract actions by employees who are unjustly denied ERISA-protected benefits. ERISA also preempts state laws that operate in arenas it does not govern, such as laws regulating the delivery of health benefits, if the laws have a relationship to employee benefit plans.

By preempting the states' authority to regulate areas that it does not address, ERISA leaves areas of the employee benefit arena devoid of any regulation. One judge has described this effect as the creation of "an

75. 29 U.S.C. § 1003(b) (1988) exempts government plans, church plans, plans maintained solely for the purpose of complying with workers' compensation, unemployment compensation or disability insurance laws, plans maintained outside the United States benefiting primarily nonresident aliens, and unfunded plans providing 'excess benefits' to management employees.
77. Franchise Tax Bd. 463 U.S. 1, 24 n. 26.
79. See, e.g., Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977) (ERISA preempts state law regulating the delivery of health care services), Alessi v. Raybestos Manhattan, 451 U.S. 504 (1980) (ERISA preempts state law prohibiting the subtraction of worker's compensation payments from pension benefits paid to workers despite ERISA's silence on calculation of pension benefits); Standard Oil Co. of Cal. v. Agsalud, 633 F.2d 760 (9th Cir. 1980) (ERISA preempts state law requiring employers to provide catastrophic health care to employees despite ERISA's silence on the contents of benefit plans).
enormous regulatory vacuum."\textsuperscript{80} A second has expressed the concern that "[t]he ERISA quicksand is fast swallowing up everything that steps in or near it",\textsuperscript{81} noting that "[t]here is a growing phalanx of courts expressing the fear that ERISA will continue to expand and to preempt everything in its meandering path . . . ."\textsuperscript{82}

A genuine risk exists that the WFMLA will sink, at least partially, into ERISA's "quicksand." Three provisions of the WFMLA may relate to employee welfare benefit plans: the requirement that employers provide unfunded leave itself, the provision permitting employees to substitute employer-provided leave for statutory leave, and the requirement that employers continue group insurance coverage for employees absent on leave.\textsuperscript{83}

**B. Identifying Preemption**

Courts consider several questions in determining if a state law is preempted by ERISA. As a threshold matter, a court must determine if employee benefits affected by the state law are provided through ERISA employee benefit plans. This is a three-part question which requires the court to determine if the benefits are of the type generally governed by ERISA,\textsuperscript{84} if they are provided through a plan,\textsuperscript{85} and if the plan is statutorily exempted from ERISA governance.\textsuperscript{86} If the affected benefits are provided through an ERISA plan, the law is generally preempted if it "relates to" the plan as the words are used in ERISA.\textsuperscript{87}

Some state laws that relate to ERISA employee benefit plans are saved from preemption by statutory exceptions. ERISA does not preempt state laws regulating insurance, banking and securities,\textsuperscript{88} or any criminal laws.\textsuperscript{89} State laws are not preempted in cases where preemption would

\begin{footnotes}
\item 80. Gast v. State, 585 P.2d 12, 23 (1978) (Johnson, J.). During debates of the House-Senate Joint Conference Committee that finalized ERISA, one of ERISA's sponsors stated that he expected "a body of federal substantive law" to be developed by the courts to deal with issues involving the administration of benefit plans. 120 CONG. REC. 29,942 (1974). To the extent that the courts have authority to make laws regulating plan administration, federal common law may eventually fill in a portion of the regulatory vacuum.
\item 82. \textit{Id.} at 835.
\item 83. See infra text accompanying notes 169-205.
\item 85. Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 7-8 (1987).
\item 86. 29 U.S.C. § 1003(b) (1988).
\item 87. See infra text accompanying notes 118-68.
\item 89. 29 U.S.C. § 1144(b)(4) (1988).
\end{footnotes}
"alter, amend, modify, invalidate, impair or supersede" federal laws. Several amendments void the effects of preemption when applied to specified laws. One amendment exempts the Hawaii Prepaid Health Care Act, that state's effort to provide minimum insurance protection for all workers. Another amendment saves qualified domestic relations orders from preemption. A third amendment permits states to apply insurance funding laws to "multiple employer trusts," cooperative benefit plans operated by groups of employers.

1. EMPLOYEE BENEFIT PLANS DEFINED

Many employee benefits are not governed by ERISA. ERISA benefits are pensions and other benefits provided through trusts or plans that accumulate, are paid to employees at non-regular intervals, and place an on-going administrative burden on employers. Several types of employee benefit plans are exempted entirely from ERISA regulation. Specifically, governmental and church employers' plans, unfunded 'excess benefit plans,' providing high levels of benefits to managerial employees, and plans maintained outside the United States primarily benefitting nonresident aliens are excluded. Employee benefit plans maintained solely for the purpose of complying with state worker's compensation laws, unemployment compensation laws, and disability insurance laws are likewise exempted from ERISA governance.

90. 29 U.S.C. § 1144(d) (1988). This provision has saved from preemption several state laws requiring employers to provide maternity leave or benefits through disability plans, on the theory that state nondiscrimination laws are integral to the enforcement of Title VII of the Civil Rights Act of 1964. See Teresia B. Jovanovic, Annotation, ERISA-Preemption of State Laws, 72 A.L.R. FED. 489, 497-502 (1985).
92. 29 U.S.C. § 1056(d)(3) (1988). Qualified domestic relations orders are orders pursuant to state domestic relations law relating to child support, alimony, or family property rights of spouses, ex-spouses or children.
101. 29 U.S.C. § 1003(b)(3) (1988). Note that only separate plans maintained solely for the purpose listed are exempted. A state law requiring employers to provide unemployment compensation, worker's compensation or disability insurance through an ERISA plan would be preempted. The Supreme Court has held, however, that states may require employers to establish separate plans for the administration of the specified benefits, and permit employers to fill that requirement by providing the specified benefits.
Non-pension benefits governed by ERISA are called "employee welfare benefit plans." ERISA defines employee welfare benefit plans as plans, funds or programs established or maintained by an employer or employee organization to provide specified types of benefits to plan participants and their beneficiaries. The benefit types specified include medical care and other sickness, accident and disability benefits, death, unemployment and vacation benefits, apprenticeship and training benefits, daycare centers, scholarships, pre-paid legal services, and other benefits that are funded out of trusts.

The Department of Labor, one of ERISA's administering agencies, has enacted regulations to clarify this statutory definition. The Department of Labor regulations distinguish employee welfare benefit plans from other employee benefits classified as "payroll practices." The regulations state that payroll practices are payments to employees from employers' general assets, and are part of employees' normal compensation, not subject to ERISA.


103. The text of the relevant section is:

The terms "employee welfare benefit plan" and "welfare plan" mean 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 . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or pre-paid legal services.


104. The Labor Department administers ERISA's reporting and disclosure provisions. ERISA is also administered by the Treasury Department, which governs plan tax qualification (tax exempt status), and the Pension Benefit Guaranty Corporation, which administers a plan insurance program. John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 71-73 (1990).


106. 29 C.F.R. § 2510.3-1(b) (1991). The text states, in relevant part, that payroll practices include:

Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons . . . [and] . . . [payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although . . . not absent for medical reasons performs no duties . . .

The Department has applied the regulation in several advisory opinions. See Opinion No. 89-06A, 1989 WL 206410; Opinion No. 80-44A, 1980 WL 8942, Opinion No. 79-69A, 1979 WL 7006.
The Department regulations distinguish payroll practices from benefits, generally subject to ERISA, that accumulate in a trust or fund. This distinction is consistent with ERISA's original purpose, combatting the mismanagement of accumulated benefit funds.

a. Judicial interpretation

Recent case law has clarified this distinction, demonstrating that an analysis of a benefit's funding source alone is not sufficient. The totality of circumstances must be considered, including the manner in which a benefit is paid, the event that triggers its payment, and the need for ongoing administration. The United States Supreme Court considered the manner and the events triggering payment in Massachusetts v. Morash. The Morash Court found that a Massachusetts law requiring employers to pay terminated employees for their unused vacation was not preempted by ERISA because vacation pay was not an ERISA benefit. The Court considered the benefit's characteristics in determining its status, noting that vacation is typically provided throughout the term of employment, and that its payment does not depend on the occurrence of contingencies outside the employee's control. Noting that Congress's primary concern in enacting ERISA was "the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees' benefits from accumulated funds," the Court found that ordinary vacation benefits were not subject to ERISA governance since they "present none of the risks that ERISA is intended to address." In Fort Halifax Packing Co., Inc. v. Coyne, the Court examined the need for

107. See Donovan v. Dilligham, 688 F.2d 1367, 1370-73 (11th Cir., 1982), "the existence of appellees management of a trust . . . does not necessarily mandate a finding that employee welfare benefit plans exist . . . in determining whether a plan, fund or program . . . is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing and procedures for receiving benefits . . . no single act in itself necessarily constitutes the establishment of a plan, fund or program."


109. Morash, 490 U.S. at 114-16. Contrast pension benefits, paid after the term of employment, and death benefits, paid upon the occurrence of a contingency outside the employee's control.

110. Id.

111. Id. The Court concluded with a cautionary note, stating that its holding was limited to a situation involving payments by a single employer out of general assets. The Court noted that a different situation would have been presented if the case had concerned a fund created by a group of employers to provide vacation benefits for laborers who shifted jobs among the employers, because the risks faced by those employees would give rise to the type of funds mismanagement concerns that spurred ERISA's enactment. Id. at 120.
ongoing administration in determining that a one-time severance payment was not governed by ERISA. The Fort Halifax Court held that ERISA did not preempt a state law requiring employers to make a severance payment to employees who lost their jobs in plant closings, although severance payments are post-termination benefits, normally governed by ERISA. The Court reasoned that one-time payments were not subject to ERISA because they did not implicate any of the plan-management concerns that led Congress to enact the statute.

The Court stated that the purpose of ERISA’s preemption clause was to minimize the burden of regulatory compliance ERISA imposed on employers. ERISA was to achieve this purpose by enabling employers to implement a uniform administrative scheme, free from conflicting or inconsistent state regulation. The Court found that Congress’ concerns were not implicated by a requirement that employers make a one-time payment, noting that "to do little more than write a check hardly constitutes the operation of a benefit plan." Ongoing administration was required to implicate the potential for plan management abuses that Congress had responded to in enacting ERISA.

One significant form of plan administration is compliance with ERISA’s reporting and disclosure regulations. Compliance is not in itself dispositive, however, since establishing compliance as a single-factor test would enable employers to escape ERISA’s fiduciary and enforcement provisions by failing to comply with the statues’ reporting and disclosure requirements. No single or universally applicable factor can be isolated for determining if a benefit is subject to ERISA. A case by case evaluation of benefits’ characteristics, funding sources and administration is required.

113. Fort Halifax, 482 U.S. at 14-15, n.9 (1987). The Court distinguished the payment of severance once during the life of a company, at its plant closing, from benefits like death benefits that are paid only once to individual employees but require ongoing administration by the employer. The Court described plan administration as involving an on-going series of activities and obligations, including calculations of benefit eligibility and levels, records maintenance, reporting and other functions.
114. Id.
115. Id.
116. Id. at 16. The Court noted that, because no potential for administrative abuse existed without ongoing administration, "preemption would in no way serve the overall purpose of ERISA." Justices White, Rehnquist, Scalia and O’Connor dissented from this opinion, accusing the majority of creating a loophole that would provide states with a means of circumventing Congressional intent. The dissenters stated, in an opinion authored by Justice White, that "[a] state law which requires employers to pay employees specific benefits clearly ‘relates to’ benefit plans under ERISA’s statutory definition." Id. at 23 (citation omitted).
117. Donovan, 688 F.2d at 1372.
2. THE MEANING OF "RELATES TO"

ERISA's section 514 states that the statute preempts state laws that "relate to" employee benefit plans. The Supreme Court commented on the ambiguity of this language in *Metropolitan Life v. Massachusetts*, noting that ERISA's preemption provision was "perhaps . . . not a model of legislative drafting." Judicial experience with ERISA has emphasized the Court's critique. The proper interpretation of the words "relate to" has historically been a source of disagreement and confusion among courts examining ERISA preemption questions.

a. The majority view

The United States Supreme Court has stated that the words should be read broadly. In *Shaw v. Delta Air Lines, Inc.*, the Supreme Court stated that the words' plain meaning made it "apparent" that ERISA's preemption clause should be read as extending to any state law that has a "connection with or reference to" an employee benefit plan. The Court consulted *Black's Law Dictionary* to find that the word "relate" was defined as "[t]o stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." The Court cited this definition, with a "see also" reference to a 1933 patent case, as authority for the proposition that "[a] law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."

The Court found support for its broad interpretation of section 514(a)'s language in the remainder of section 514 and ERISA's legislative history. The Court stated in a brief section that interpreting the "relates to" language to preempt only state laws "specifically designed to effect employee benefit plans would be to ignore the remainder of section 514." The Court reasoned that if Congress intended the narrower

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119. 471 U.S. 724, 739 (1984). This comment was directed at both the preemption clause, § 514(a), and the exception for state laws regulating insurance, securities and banking, § 514(b)(2)(A) (commonly referred to as the "savings clause.")
120. Kilberg & Inman, *supra* note 11, at 1316.
122. *Id.* at 96-97.
123. *Shaw*, 463 U.S. at 96-97 & n.16.
125. *Shaw*, 463 U.S. at 98.
construction, it would have needed to specifically exempt generally applicable state criminal statutes from preemption.  

The Shaw Court's primary source of support for its interpretation was ERISA's legislative history. The Court observed, in a detailed discussion, that both the House and Senate versions of the bill that became ERISA had limited preemption to the specific subjects ERISA governed. The House version provided that ERISA would supersede state laws "relating to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan" governed by the bill. The Senate version preempted state laws "relating to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act." The enacted preemption language was developed by a joint conference committee, which, according to the Court, "rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language."

The Shaw Court applied this interpretation to an employer's claim that ERISA preempted New York State's Human Rights Law, forbidding pregnancy discrimination in employee benefit plans, and its

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126. Shaw, 463 U.S. at 98. However, in a subsequent case a divided Court found that Congress had used redundancy for clarification when it amended ERISA with language specifically exempting state garnishment procedures that were generally exempt from preemption. Mackey v. Lanier Collection Agency, 486 U.S. 825, 838-39 (1988). Justices Kennedy, Blackmun, O'Connor and Scalia dissented, stating that the majority's interpretation rendered ERISA's provisions redundant, in disregard of the accepted rules of statutory construction. Mackey, 486 U.S. at 845-46. The majority responded to this allegation by distinguishing the effect of a redundancy created by Congressional action subsequent to the date of a statute's enactment and "the suggestion that Congress intentionally adopted, at a single time, two separate provisions having the same meaning." Mackey, 486 U.S. at 839.

In addition this reading does not consider the entire "remainder of section 514." It overlooks the more restrictive language used in section 514(c)'s definition of "state." That section suggests that it was Congress' intention to restrict ERISA preemption to state laws that regulate the terms of conditions of ERISA employee benefit plans, defining the term as "a State, any political subdivisions thereof, or any agency or instrumentality thereof, which purports to regulate directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2) (1988), (emphasis added). This argument was addressed, and rejected by the Court, in McClendon, 111 S.Ct. at 484.

127. Shaw, 463 U.S. at 98.
128. Id. at 98, n. 18.
129. Id.
130. Id. at 98.
131. Id. at 88 (citing N.Y. Exec. Law §§ 290-301 (McKinney 1982 and Supp. 1982-83)).
Disability Benefits Law, requiring employers to provide disability insurance to employees. The Court stated that it had "no difficulty" concluding that the laws "related to" employee benefit plans in the case of the employer, which provided medical and disability benefits to its employees through an ERISA plan.

The Court acknowledged in a footnote that its analysis contained some limits, stating that some relationships between state laws and benefit plans may be "too tenuous, remote or peripheral" to implicate preemption. The Court declined, however, to express an opinion on "where it would be appropriate to draw the line."

The Court suggested one boundary in Mackey v. Lanier Collection Agency & Serv., Inc. The Mackey Court held that state garnishment statutes which specifically protected ERISA plans from garnishment are preempted, but that garnishment statutes of general application are not preempted, even when applied to ERISA plans. The Court reasoned that the law exempting ERISA plans from garnishment "single[d] out ERISA plans for different treatment" by expressly referring to the plans and according them different treatment than non-ERISA plan garnishment targets. The general garnishment statute, in contrast, did not "single out or specially mention ERISA plans of any kind."

132. Id. at 89 (citing N.Y. Work. Comp. Law §§ 200-242 (McKinney 1965 and Supp. 1982-83)).
133. Shaw, 463 U.S. at 96. The Court next proceeded to determine whether the preemption exceptions contained in ERISA saved the state laws from preemption. Because plans maintained for the purpose of complying with state disability insurance laws are exempt from ERISA (29 U.S.C. § 1003(b)), the Court found that the disability insurance law was not preempted insofar as it required employers to establish separate plans to provide disability insurance. The Court also held that the state could permit employers to discharge the obligation of providing disability insurance through their ERISA multi-benefit plans, as long as the state did not attempt to regulate the contents of the plans. Shaw, 463 U.S. at 106-09.

Noting that ERISA does not preempt state laws when their preemption would interfere with the operation or enforcement of federal law (29 U.S.C. § 1144(d)), the Court found that the maternity benefits law was saved from preemption to the extent that preemption would impair the enforcement of Title VII. The Court held, however, that the law was preempted to the extent that it forbade employers to engage in practices that were permitted under federal law. Id. at 101-06.
134. Id. at 100, n. 21.
135. Id. at 100, n. 21.
137. Id. at 841.
138. Id. at 830, n.4.
139. Id. at 831. The Court also considered the overall structure of ERISA and the fact that Congress had permitted suits against ERISA plans in determining that Congress intend to permit the plans to be garnished. Id. at 831-38.
The Court applied Mackey's "singling out" rule in its most recent ERISA preemption decision, Ingersoll Rand Co. v. McClendon. The McClendon Court found that Texas' wrongful discharge law, which forbid employers to discharge employees to avoid incurring pension obligations, was preempted because it made "specific reference to, and indeed [was] premised on, the existence of a pension plan." The plaintiff, Perry McClendon, had worked for Ingersoll-Rand Corporation for nine years and eight months when his job was eliminated through a company-wide reduction in force. McClendon brought several state wrongful discharge claims against the company, claiming that it had fired him to avoid paying his pension. McClendon prevailed in the Texas Supreme Court, and the employer appealed to the United States Supreme Court with a claim that ERISA preempted the state cause of action.

The Court ruled for the employer, finding that the state law that created McClendon's cause of action was preempted for two reasons. The Justices unanimously held that the actions were preempted because they conflicted with an ERISA cause of action. Justices O'Connor, Rehnquist, White, Scalia, Kennedy and Souter also held that the actions were preempted because they "related to" pension plans.

In analyzing whether the Texas causes of action "related to" pension plans, the majority rejected the employee's argument that ERISA preempts only state laws affecting plan terms, conditions, or administration. The majority utilized the Mackey analysis, finding that state laws that make reference to, or are premised on, the existence of a plan are preempted. Justice O'Connor, writing for the majority, distinguished Mackey's facts, stating that "we are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of the existence of an ERISA plan." O'Connor explained that in order to prevail with a Texas wrongful discharge claim a plaintiff must plead that a plan existed and that his employer discharged him for reasons related to the plan. "Because the court's inquiry must

141. *Id.* at 483.
142. *Id.* at 481.
143. *Id.* McClendon was unaware that he was already credited with sufficient service to vest his pension.
144. *Id.*
145. *Id.* at 484-85.
146. *Id.* at 482-84. Justices Marshall, Blackmun and Stevens declined to join this portion of the decision.
147. *Id.* at 484.
148. *Id.* at 483.
149. *Id.* at 483.
150. *Id.*
be directed to the plan," the Justice wrote, "this judicially created cause of action 'relate[s] to' an ERISA plan."151

The majority quoted Shaw's "connection with or reference to" language, noting that a state law may be preempted "even if the law is not specifically designed to affect [employee benefit] plans, or the effect is only indirect."152 Justice O'Connor explained that this outcome was necessitated by Congress' intention that plan administrators not be subject to the burden of conflicting state laws,153 and noted that the use of the words "relate to" would have been superfluous if Congress had intended the preemption clause to be given a more narrow interpretation.154

b. A competing interpretation

McClendon's dissenters did not write a separate opinion. However, in FMC Corporation v. Holliday,155 a case the Court decided only six days earlier,156 Justice Stevens dissented to a similar interpretation of the "relates to" language. The Holliday Court held that ERISA preempted a Pennsylvania law forbidding employer benefit plan subrogation of employee tort recoveries.157 The Holliday Court had also applied the Shaw test, stating that "[w]e made clear in Shaw v. Delta Air Lines . . . that a law relates to an employee benefit plan if it has a connection with or reference to such a plan."158

Justice Stevens described the majority's interpretation of the "relates to" language as "an unnecessarily broad reading."159 The Justice acknowledged that this reading was "supported by language" in some of the Court's prior opinions, but stated that it was not dictated by any prior holding.160 "I am persuaded," the Justice wrote, "that Congress did not intend to cut nearly so broad a swath in the field of state laws as the Court's expansive construction will create."161

Justice Stevens presented an alternative interpretation of ERISA's legislative history. Stevens argued that Congress had intended to preempt only state laws that regulated subjects governed by ERISA,162 and that

151. Id.
152. Id.
153. Id. at 484.
154. Id.
156. McClendon was decided on December 3, 1990 Holliday was decided on November 27, 1990.
158. Id.
159. Id. at 412.
160. Id.
161. Id.
162. Id.
Wisconsin's Medical & Leave Act

clause's final version should be regarded as an "editorial amalgam of the [House and Senate] bills rather than as a major expansion of the section's coverage."163 The Justice also reminded the Court of the general rule that, when there is ambiguity in a statutory provision preemption state law, courts should apply a presumption against invalidating generally applicable state rules.164 In Justice Stevens' view, the Court's aggressive approach to ERISA preemption corrupted both Congressional intent and a basic tenet of federalism.

Commentators have likewise argued that ERISA's legislative history does not support the Court's broad reading of the "relates to" language. Authors Leon Irish and Harrison Cohen describe the language as "more in the nature of a quick settlement of general principle than a workable, final rule."165 The authors state that ERISA's sponsors did not intend the enacted preemption clause language to be final, citing sponsoring Senator Jacob Javits' statements that the preemption clause should be reviewed to determine what modifications were needed.166 The authors also considered the fact that Congress took the first step toward modification by creating a Joint Pension Task Force charged with studying the effects of ERISA preemption.167 Daniel Fox and Daniel Schaffer interviewed participants in ERISA's development and studied the preemption clause's legislative history. These authors concluded that ERISA's drafters never fully considered the effects of its broad preemptive language or intended the outcomes that it has incited.168

These interpretations, like Justice Stevens', suggest that the Court misread Congress' intent in constructing its broad interpretation of ERISA's preemptive language. In light of this ambiguity, and ERISA's invasive encroachments on state legislative efforts, courts would be prudent to narrow their interpretations of ERISA's preemptive effect until Congress provides a more definitive statement of its intentions.

163. Holliday, 111 S.Ct. at 403, 412.
164. Id.
166. Id. at 113. The authors state that Senator Javits "suggested that [the preemption clause] was perhaps an overinclusive starting point for preemption analysis, noting parenthetically that the 'desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention.'"
IV. APPLICATION OF PREEMPTION ANALYSIS TO WFMLA

Whether ERISA preempts the WFMLA will depend on whether courts find that the WFMLA's provisions "relate to" ERISA employee benefit plans. Even if a relationship exists in the abstract, preemption will not exist in individual cases unless the affected benefits are provided through an ERISA employee benefit plan and no statutory exceptions apply. The exemption of specified plan types can be significant in protecting the WFMLA's enforceability for many employees. Government plans, for example, are exempted. Wisconsin's state government employees are major beneficiaries of the WFMLA.

A. Statutory Leave Generally

State laws requiring employers to provide ERISA benefits to employees are generally preempted. The unpaid leave required by the WFMLA has some of the hallmarks of an ERISA benefit but is not governed by ERISA because it does not give rise to the funds-management concerns that led to the statute's enactment. As the United States Supreme Court specifically noted in *Morash*, benefits that do not implicate funds management concerns are not the type that Congress intended to regulate through ERISA.

Although unpaid leave is itself not a benefit subject to ERISA, its requirement may still be related to ERISA employee benefit plans. The United States Supreme Court has held that state laws are related to ERISA

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170. All employees of the state and its subdivisions are eligible for WFMLA benefits. Wis. Stat. § 103.10(c) (Supp. 1991).
171. The *McClendon* Court stated "We have virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are preempted under § 514(a)." *McClendon*, 111 S.Ct. at 483. See also cases cited in note 67, supra.
172. Medical leave taken because of the employee's own disability fits easily into ERISA's statutory definition as "benefits in the event of sickness, accident . . . or disability." 29 U.S.C. § 1002(1) (1988). Medical leave taken to provide care for family members could be classified as such a benefit provided for an employee's beneficiary. 29 U.S.C. § 1002(7) (1988). Family caretaking leave, however, appears to fit within the definition only if the term "vacation" is read broadly as any elective absence by active employees.
173. See supra text accompanying notes 68-73.
174. *Morash*, 109 S.Ct. at 1673. See also *Fort Halifax*, 482 U.S. at 15-16 (noting that a benefit payment that does not create a requirement for the ongoing management of funds does not implicate ERISA).
benefit plans if they affect benefit plan administration. The administration of ERISA plan benefits may be affected by the WFMLA provision that employees are not entitled to the accrual of seniority or other employment benefits while on leave. When employers elect not to continue the accrual of benefits during employee leave, plan administrators will be required to maintain records of employee absences and make adjustments to benefit accruals. These would be administrative requirements unique to Wisconsin, and could interfere with the purpose of providing a "uniform administrative scheme" for benefit plan management that the Supreme Court ascribed to ERISA's preemption clause in its *Fort Halifax* decision.

The Act, however, does not compel employers to discontinue their employees' seniority and benefit accruals during their leaves. The discontinuation is an option the Act provides employers. The option does not foreclose any method of calculating employee benefits permitted by ERISA. If employers elect not to take advantage of the option, their benefit plan administration will be unaffected.

In addition, any effects the statute has on benefit plans are imposed by "a generally applicable statute that makes no reference to, or indeed functions irrespective of the existence of an ERISA plan." The *McClendon* Court distinguished such generally applicable statutes from laws preempted by ERISA. Referring to the garnishment statute that

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175. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981). The Court held that ERISA preempted a state law forbidding employers to deduct worker's compensation awards from employees' pensions because it interfered with the employers' administration of their plans by foreclosing a method of calculating pension benefits that ERISA permitted.

176. *Wis. Stat.* § 103.10(9) (Supp. 1991) states in relevant part that "[N]othing in this section entitles a returning employee[e] . . . to the accrual of any seniority or employment benefit during a period of family leave or medical leave."

177. Compare the United States Supreme Court's description of ERISA plan administration in *Fort Halifax*, 482 U.S. at 1, 9:

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements.


180. Compare the Supreme Court's analysis in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981). The *Alessi* Court found a New Jersey workers' compensation statute that forbid employers to offset employees' pension benefits with workers compensation payments was preempted by ERISA. The Court concluded that the requirement related to the pension plans "because it eliminate[d] one method for calculating pension benefits . . . that [was] permitted by federal law." *Id.*

181. *Id.* at 483.

182. *Id.*
the Court had found not preempted in *Mackey*, the Court stated that the "fact that [the statute's operation] might burden the administration of a plan did not, by itself, compel preemption." Like the *Mackey* general garnishment statute, the WFMLA's unpaid leave requirement can be enforced by a court that never directs its inquiry to an ERISA plan. The provision's general applicability, therefore, should exempt it from a finding that it "relates to an ERISA benefit plan.

**B. Substitution of Employer-Provided Leave**

Administrative Law Judge Grandberry found, in *Thompson v. Northwest Airlines*, that ERISA preempted the WFMLA provision that permits employees to substitute employer-provided leave for the leave provided by the statute. This provision requires employers to provide leave benefits to employees under circumstances that they otherwise might not. This requirement affects employer's determinations of employee eligibility for the benefit, as well as requiring the employer to perform record-keeping and other administrative tasks involved in actually providing the leave. The requirement arguably has a direct effect on employers' administration of ERISA benefit plans when the substituted leave is provided through plans. In cases where the leave is provided through an ERISA-governed employee benefit plan, the provision is likely to be preempted if no statutory exception applies.

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183. *Id.*  
185. *See supra* text accompanying notes 9-14.  
187. *See Shaw*, 463 U.S. at 108. The United States Supreme Court held in Shaw that the State of New York could not require employers to provide leave to disabled employees through benefit plans governed by ERISA.

The legislature could potentially avoid preemption of this provision by amending the WFMLA to exempt leave provided through ERISA plans from substitution. The Minnesota legislature has taken this step. Minnesota's Parental Leave Act originally contained a substitution provision similar to that in the WFMLA. When the potential that ERISA preempted the provision was brought to the legislature's attention, they amended the provision to make leave provided through ERISA plans exempt from substitution. Minnesota Parental Leave Act, 1990 Minn. Gen. Laws, ch. 577, MINN. STAT. ANN. § 181.940 (West Supp. 1992). (Telephone interview with Martha Clark, Staff Attorney, Minnesota State Legislature (March 27, 1991)).

The value of such a step is questionable. It would do nothing to extend the availability of substitution if the present provision were preempted. It may, however, dissuade employer challenges to the validity of the Act as a whole.

Ironically, the inclusion of an ERISA-benefit exclusion could subject the provision to preemption. Such an exclusion would make a reference to ERISA plans by "singl[ing] out ERISA plans for different treatment," like the garnishment law in *Mackey*, 486 U.S. at 830. This explicit "reference" to ERISA plans could make the provision entirely invalid.
It is unclear, however, how much employer-provided leave is actually supplied through ERISA plans. Unpaid leave involves no funds accumulation and would not implicate the funds-mismanagement concerns that underlie ERISA's regulatory scheme. In the case of paid leave payments of employees' normal compensation during sickness and other work absences are payroll practices when the payments are made from an employers' general assets. Substitution of 'payroll practice' leave would have no effect on an ERISA plan, and would not be preempted.

Payroll practice leaves do not involve accumulated funds. This characteristic may initially appear mutually exclusive of DILHR's regulatory limitation of WFMLA substitution to leave that has accrued to the employee. However, employees often accumulate rights to unfunded benefits like vacation and sick leave. Accumulated rights to unfunded vacation pay were at issue in Morash v. Massachusetts, in which the Supreme Court found that a state law requiring employers to compensate discharged employees for accumulated vacation was not preempted by ERISA.

Employers' claims that employees' substitution requests are preempted by ERISA must, therefore, be considered on a case by case basis. In those cases where the leave to be substituted is paid as a wage, out of an employer's general assets, rather than through a segregated fund, the leave is not an ERISA plan benefit and is not subject to preemption.

C. Group Insurance Continuation

It is also likely that the WFMLA's insurance continuation provision is preempted by ERISA. In New Jersey Business and Industry Association v. State of New Jersey the Superior Court of New Jersey, Law

189. Department of Labor Regulations, 29 C.F.R. § 2510.3-1(b) (1991). The leave at issue in Thompson was sick leave.
190. Wis. ADMIN. CODE § IND 86.03(1).
191. Morash, 109 S.Ct. at 1673. The Court found that vacation benefits which are plans are only those in which "the employee's right to a benefit is contingent upon some future occurrence or the employee bears some risk different from his ordinary employment risk." See supra text accompanying notes 100-03.
192. 592 A.2d 660, 664 (1991). The court stated that the New Jersey Act's "provision for continuation of employee health benefits during a period of family leave which benefits could otherwise be terminated or suspended by an employer under ERISA came within the ambit of ERISA's preemption provision."

The New Jersey Act's continuation provision provides that:

the employer shall maintain coverage under any group health insurance policy, group subscriber contract or health care plan at the level and under the conditions coverage would have been provided if the employee had continued in employment
Division held that ERISA preempts the provision of New Jersey’s Family Leave Act requiring employers to continue employees’ group insurance benefits while the employees are absent on leave. The court applied McClendon’s “broad interpretation” of the relates to language, rejecting the respondent’s argument that the statute’s effect on employee benefits was too remote to implicate preemption. The court reasoned that under the New Jersey Act “a multi-state employer might well be compelled to adopt a special program for providing health benefits during work leaves for employees in New Jersey.”

The WFMLA’s insurance continuation provision is likely to be subject to the same finding. Employer-administered group insurance policies are clearly employee welfare benefit plans under ERISA’s statutory definition. State laws that require employers to pay benefits through ERISA plans have a direct relationship to the plans.

An alternative construction is possible, however. The insurance continuation provision does not require employers to make any additional payments to employees or the employees’ benefit plans. The provision merely forbids employers from discontinuing payments they are already making for their employees. If employers administratively classify employees who are absent on leave as the continuing employees they are, the provision will have no effect on employers’ benefit plan administration.

Continuously from the date the employee commenced the leave to the date the employee returns to work . . . .


194. Id.

195. 29 U.S.C. § 1002(1), in relevant part, defines employee welfare benefit plans as “any plans . . . established or maintained by an employer . . . for the purpose of providing . . . through the purchase of insurance . . . medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . .” See Greater Washington Board of Trade v. District of Columbia, 948 F.2d 1317 (D.C. Cir. 1991), holding that ERISA preempts law requiring employers to continue previous group insurance benefit levels and to provide new benefits to injured employees.

Employer maintenance of insurance plans includes contracting with a third party for administration. Memorial Hosp. System v. Northbrook Life Ins. Co., 904 F.2d 236, 242-43 (5th Cir. 1987). However, the “bare purchase” of an insurance policy is not sufficient to establish the existence of a plan. Taggart Corp. v. Life & Health Benefits Admin., 617 F.2d 1208, 1211 (5th Cir 1980), cert. denied, 450 U.S. 1030 (1981).

196. See R.R. Donnelley & Sons Co. v. Prevost, 915 F.2d 787, 791 (2d Cir. 1990), finding that a state law requiring insurance continuation during employee absences due to disabilities arising from work related to an employee benefit plan. The court concluded that the requirement constituted a “forbidden state encroachment on a private employee benefit plan,” stating that “its only purpose is to add an additional statutory requirement—the cost of which is to be borne by the employer—to a private employee benefit plan.”

197. Wis. STAT. § 103.10(9) (Supp. 1991).
In addition, the WFMLA's escrow account provision may save insurance continuation from preemption. If the WFMLA's insurance continuation provision can be considered a state disability insurance law, the escrow account provision may bring the Act into ERISA's disability insurance plan exemption. The exemption's text applies only to plans maintained solely for the purpose of complying with the applicable state laws, but the United States Supreme Court has stated that states can avoid ERISA preemption by requiring employers to provide benefits through separate plans, and permitting the employers to fulfill that requirement by providing benefits through ERISA plans. The Second Circuit applied this construction to find that ERISA does not preempt a Connecticut workers compensation law requiring employers to continue absent workers' group insurance in *F.R. Donelley and Sons v. Prevost.* The Connecticut statute, like WFMLA, did not require the state's employers to establish plans solely to provide worker's compensation benefits. The statute instead included the establishment of separate plans among a list of alternative compliance methods. The court found this approach sufficient to avoid preemption pursuant to *Shaw.*

Like the Connecticut statute at issue in *Prevost,* the WFMLA does not require employers to maintain a separate insurance fund, but offers employers the option of maintaining an escrow account as one form of compliance. If the insurance continuation provision of the WFMLA can be classified as a "disability insurance law" as Congress used the term

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198. The WFMLA permits employers to require employees to deposit money equal to eight weeks of the employee's insurance premium with the employer, to be held in escrow and returned to the employee upon termination of employment. Wis. Stat. § 103.10(9)(c) (Supp. 1991). If employees terminate their employment within 30 days of a return from leave, employers are permitted to recover funds from the account equivalent to group insurance contributions made on behalf of the employee during her leave. Wis. Stat. § 103.10(9)(c)(4) (Supp. 1991).

199. *Shaw,* 463 U.S. at 107-08. The *Shaw* Court stated that "while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." *Id.* at 108.

200. 915 F.2d 787 (2d Cir. 1990); *but see* Greater Washington Bd. of Trade v. District of Columbia, 948 F.2d 1317 (D.C. Cir. 1991) (holding that ERISA preempted a D.C. law requiring group insurance continuation for absent employees receiving worker's compensation).

201. 915 F.2d at 787, 788, n.1.

202. *Id.* at 793, citing *Shaw,* 463 U.S. at 107 (1983).

203. Wis. Stat. §103.10(9)(c) (Supp. 1991) states that "an employer may require an employee to have in escrow with the employer an amount equal to the entire premium or similar expense for 8 weeks of the employee's group insurance coverage . . . ." (emphasis added).
in ERISA, the escrow account option should insulate the insurance continuation provision from preemption.

1. POSSIBLE LEGISLATIVE RESPONSE

The Wisconsin Legislature could amend the WFMLA to make ERISA's disability insurance exemption more clearly applicable. Initially, the legislature could incorporate a statement that a purpose of the law is to provide insurance coverage to disabled employees. A second amendment could define "disabled" as suffering from one of the conditions the Act covers, both disabling medical conditions and family necessities that render the employee unable to work. A third amendment could more explicitly require employers who provide insurance to establish a plan to be used in maintaining previous levels of coverage, and grant employers the options of fulfilling the requirement through an existing plan or an employee-funded escrow account. These actions could help to make WFMLA's insurance continuation provision more resistant to ERISA preemption, and would not effect any of the Act's substantive provisions.

Alternatively, the legislature could reformulate the insurance continuation provision as a requirement that group insurance contracts sold to Wisconsin employers provide for continuation of coverage during

204. 29 U.S.C. § 1103(b)(3) (1988). This is, concededly, far more plausible in cases involving an employee's own medical impairment than in cases involving family leave.

205. The statute upheld in Prevost provided:

(a) ... any employer ... who provides accident and health insurance or life insurance coverage for any employee or makes payments or contributions at the regular hourly or weekly rate for full-time employees to an employee welfare fund shall provide to such employee equivalent insurance coverage or welfare fund payments or contributions while the employee is eligible to receive or is receiving worker's compensation . . . .

(b) An employer may provide such accident and health insurance coverage or welfare payments and contributions by: (1) Insuring his full liability under this act in such stock or mutual insurance companies or associations as are authorized to take risks in this state; (2) creating an injured employees' plan as an extension of any existing plan for working employees; (3) self-insurance; or (4) by such combination of the above-mentioned methods as he may choose.


Wisconsin could insert similar language into the insurance-continuation section of WFMLA, incorporating the escrow account option as one of the (b) compliance methods.
employee leaves. The United States Supreme Court has held that the contents of insurance contracts are a valid subject of state insurance regulation. In *Metropolitan Life Ins. Co. v. Massachusetts*, the Court held that a Massachusetts law requiring insurers to provide mental health benefits to state residents insured by general insurance policies was not preempted by ERISA. The Court rejected arguments that the law was really a "health law" that acted on insurers solely to impose a benefit mandate on employers, determined that the law was not preempted because it regulated the "business of insurance."

A law that required insurers to include continuation of coverage during employee leaves in policies would regulate the business of insurance. Like the Massachusetts mental health law, the law would regulate the relationship between the insurer and the policy holder by limiting the type of insurance that the insurer is permitted to sell to the employer, and would impose requirements only on insurance companies. This legislative action, however, would provide only a partial solution, since it would be inapplicable to the approximately 50% of Wisconsin employers who self insure. Because large employers more commonly

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206. The requirement would have to be clearly directed to the insurance industry, rather than individual employers, to be valid. ERISA's "deemer clause" forbids states to use the insurance exception to circumvent ERISA preemption by enacting laws that operate on employee benefit plans or trusts and deeming them insurance companies for the purposes of the regulation. 29 U.S.C. § 1144(b)(2)(B) (1988).


209. The Court stated that a three-part test should be used to determine whether a state law is an insurance industry regulation exempt from ERISA preemption: first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *Id.* at 743 (citing *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)).

This is the test that courts apply to determine whether a regulation acts upon the business of insurance in applying the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq*. The Court applied the same test in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) to find that a state law forbidding bad faith breach of contract did not regulate insurance when applied to an insurance company because the law was not specifically directed to the insurance industry.

210. Self-insured plans are unaffected by state insurance regulation. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (state law regulating insurance companies does not affect self-insured employers). This exception is applicable only to laws regulating the insurance industry, and not to laws regulating employers providing insurance benefits to employees. *See* 29 U.S.C. § 1144(b)(2)(B) (1988), employee benefit plans are not to be deemed insurance companies for the purpose of state laws regulating insurance.

The Wisconsin Office of the Insurance Commissioner estimates that over 50% of the state's employers self insure. Telephone interview with Robert Walker, Senior Examiner,
have the resources to self-insure, this action would disproportionately impact smaller employers. In addition, because of this effect, it is possible that such a modification would actually decrease the number of employees able to benefit from insurance continuation.\textsuperscript{211}

V. A Call to Congress

The only legislative action that is certain to secure all WFMLA provisions from ERISA preemption is a Congressional amendment that exempts family and medical leave laws from ERISA preemption. Wisconsin and other states' legislators who support family and medical leave legislation should join forces and encourage Congress to amend ERISA to except family and medical leave law from preemption.

Many states are affected by the potential for ERISA preemption of family and medical leave laws. In 1991, eighteen states required private employers to provide leave for parenting, family caretaking, or personal medical needs.\textsuperscript{212} Seven states required that employee benefits be


\textsuperscript{211} In addition, such a change might be politically infeasible, since it would likely receive vigorous opposition from the insurance lobby.


continued during employee leaves,\textsuperscript{213} and five states permitted employee substitution of employer-provided leave for statutory leave.\textsuperscript{214} The potential for ERISA preemption of state family and medical leave Acts has become an issue in the courts or legislatures of at least four states. Employers in Wisconsin\textsuperscript{215} and New Jersey\textsuperscript{216} have prevailed with claims that provisions of those state's Acts are invalid. Participants in the development or consideration of family and medical leave legislation have raised the potential for its preemption in Maine,\textsuperscript{217} Minnesota,\textsuperscript{218} New

\begin{itemize}
\item \textsuperscript{213} The seven states are: Maine, ME. REV. STAT. ANN. tit. 26 § 845.2(West 1991)(employees may continue benefits at their own expense); Minnesota, MN. STAT. ANN. § 181.941(4)(West Supp. 1992) (employer must make insurance available, but can require employees to pay entire cost); New Jersey, N.J. REV. STAT. § 34:11B-8 (1991) (employer must maintain health insurance under the conditions that apply when the employee is active); Rhode Island, R.I. GEN. LAWS § 28-48-3(b) (Supp. 1991) (employer must continue health benefits as if the employee had not taken leave, but the employee must pay his employer the amount necessary to maintain the health benefits during his leave before the leave commences. The employer is required to refund these payments to the employee after his return to work.); Vermont, VT. STAT. ANN. tit. 21 § 472(c)(Supp. 1989)(Employers must continue all benefits during leaves but may require employees to pay the full costs. Employees who do not return to work after their leaves are required to reimburse their employers.); Washington, WASH. REV. CODE ANN. § 49.78.080(3)(West 1991)(Employers must permit employees to continue medical or dental plan coverage at the employee's own expense), and Wisconsin, Wis. STAT. § 103.10(9)(b)(1990). Massachusetts and Tennessee require employers to provide employees on family or medical leave benefits equivalent to those provided to employees who are on another type of leave. MASS. GEN. LAWS ANN. § 105D (West 1982 and Supp. 1989), TENN. CODE ANN. § 4-21-408(c)(1)(Michie 1985 and Supp. 1988).

\item \textsuperscript{214} The states are: California, CAL. GOV'T CODE § 12945(b) (1992) (Employees may substitute accrued paid leave for statutory maternity leave); Louisiana, LA. REV. STAT. ANN. § 1008(A)(2) (substitution of accrued paid vacation during maternity leave); Oregon, OR. REV. STAT. § 659.360(3)(1990); Rhode Island, R.I. GEN. LAWS § 28-48-2(b)(1991); Vermont, VT. STAT. ANN. tit. 21 § 472 (1991).

\item \textsuperscript{215} See supra text accompanying notes 10-15.

\item \textsuperscript{216} See text accompanying notes 177-79.

\item \textsuperscript{217} Telephone interview with Mila Dwelley, Research Assistant, Office of Policy and Legal Analysis for the State of Maine (March 27, 1991). The issue arose while the legislature was considering amendments to the Maine Family and Medical Leave Act in March of 1991.

\item \textsuperscript{218} Telephone interview with Janice Steinschneider, Staff Attorney, Center for Policy Alternatives (March 27, 1991). The issue arose while the legislature was considering the Act's initial passage. The legislature modified the Act's substitution provision to limit substitution of employer-provided leave to leave provided out of general revenues and not subject to ERISA.
\end{itemize}
Jersey and Wisconsin. It is likely that this issue was discussed in other states.

It is implausible that Congress intended to preempt family and medical leave legislation when it enacted ERISA. The economic trends that provided the impetus for family leave legislation were barely developing in 1974, and did not become evident until years later. The first federal family and medical leave bill was introduced in Congress in 1985, eleven years after ERISA's passage.

The 1974 Congress did consider other forms of legislation through which states provide employment-related "safety nets" to workers, and specifically reserved unemployment compensation, workers' compensation and disability insurance plans to state regulation. The policy of reserving these "safety-net" matters to state regulation supports the exemption of new forms of safety-net legislation, such as family and medical leave, that states develop to assist their working people.

Such an amendment would not be without precedent. Congress, in the past, has demonstrated a willingness to reform ERISA when its provisions conflicted with family matters. In 1984, Congress amended ERISA's

219. Telephone interview with Melanie Griffen, New Jersey Commission on Sex Discrimination in the Statutes (March 26, 1991). The issue of potential ERISA preemption first arose after the New Jersey legislature had passed the state's family leave bill, and the bill was awaiting the governor's signature. Advocates for the Act asked the governor to lobby Congress for an exception to ERISA preemption for the state's Act, but the governor received an attorney's opinion that the Act was not preempted, and signed the bill without seeking the exception.

220. See supra text accompanying notes 65-69.

221. Telephone interview with Janice Steinschneider, supra note 218. Ms. Steinschneider believes it is likely that many states changed their family and medical leave acts during their development stages in order to avoid ERISA conflicts.

222. There is substantial support for the proposition that Congress did not intend to preempt many forms of legislation subsequently found preempted. See supra text accompanying notes 155-68. This proposition extend to laws in existence in 1974, as well as new forms of legislation developed to meet the needs of a changing workforce. See, e.g., Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991) (holding that ERISA preempts Minnesota job-safety laws regulating apprenticeship programs, an area regulated by the state since 1947); accord Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719 (9th Cir. 1989) (holding that ERISA preempts California's regulation of apprenticeship programs).

223. See supra text accompanying notes 47-58.


226. Senator Plewa has characterized the Act as a new form of protective labor legislation, a "response to a new era for families and work, just as the minimum wage, unemployment compensation and health and safety protections were a response to other changes in the work environment." Memoranda from Senator Plewa to the members of the Wisconsin State Assembly, Feb. 29, 1988 (on file with Wisconsin Law Review).
"minimum participation standards" to forbid employers to count time that employees are absent from work due to pregnancy, childbirth, adoptive placements, or the care needs of newly-born or adopted children as breaks in employee service that could make employees ineligible for benefit plan participation.227 The same year, Congress amended ERISA to exempt from preemption the application to benefit plans of Qualified Domestic Relations Orders (QDRO's), including child support orders, divorce settlements and marital property distributions.228

Congress has also enacted narrowing amendments when preemptive overreaching has become apparent in other contexts. In 1982, Congress responded to abuses in the management of fully insured multiple employer trusts (METS) by amending ERISA to permit states to regulate their reserve levels.229 Before the enactment of the amendment, managers of the trusts were able to escape all funding regulation by registering the trusts as ERISA plans, since ERISA does not regulate benefit plan funding and the trusts' status as ERISA plans precluded all state regulation.230 In the same amendment, Congress also excepted Hawaii's requirement that employers provide comprehensive prepaid health insurance to their workers, claiming that it had unintentionally preempted this pre-existing law when it adopted ERISA.231 Like the cases that Congress has


228. ERISA Pub. L. No. 98-397, title I, § 104(a) (1984), codified at 29 U.S.C. §§ 1056(d)(3)(b) & 1144(b)(7) (1988). Prior to this Congressional action, family members with state law claims to an employed family member's benefits were sometimes left without recourse when the benefit holder claimed that ERISA preempted the state law order.

229. ERISA Pub. L. No. 97-473 § 302(b) (1983), codified as amended at 29 U.S.C. § 1144(b)(5)(A) (1988). METS are trusts operated by groups of small employers that pool their resources to provide benefits to their employees. The relevant statutory language provides:

[In the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured ... any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides ... standards, requiring the maintenance of specified levels of reserves and specified levels of contributions ... .]


responded to in the past, ERISA’s potential preemption of family and medical leave laws is a case of ERISA’s preemptive reach compromising the public interest without furthering the statute’s purposes. In the case of family and medical leave, ERISA preemption actually conflicts with the statute’s purpose of furthering the interests of employees.

Congress has demonstrated that it understands the importance of family and medical leave legislation by passing a Federal Family and Medical Leave Act, an effort frustrated by presidential veto. An ERISA preemption exception would enable states to assist their citizens through family and medical leave legislation. This exception would also promote state experimentation with various forms of family and medical leave, which would produce useful information for the design of subsequent federal act proposals.

Congress should respond, as it has in the past, to evidence that ERISA’s preemptive scope is reaching more broadly than Congress intended by amending the statute to exempt family and medical leave legislation from preemption. Such an amendment would free the states to respond to their working peoples’ needs for assistance resolving work and family conflicts, and enable them to fulfill ERISA’s purpose of assisting working people and their beneficiaries.

VI. CONCLUSION

Wisconsin has responded to its working peoples’ needs to manage work and family conflicts by enacting a Family and Medical Leave Act. Paradoxically, this important form of assistance to working families may be in danger of being preempted by ERISA, a statute enacted to protect

For discussion of the history and significance of this amendment, see supra note 165, at 148-53.


233. Pundits may argue that Congress’ action in passing these bills demonstrates its determination that family and medical leave legislation is properly a federal matter, and that state family leave acts interfere with the Congressional intent to create a uniform national regulatory framework for benefits ascribed to ERISA in Fort Halifax. The “uniform national plan rhetoric is belied by the fact that Congress frustrated this objective by excepting state regulation of the insurance, banking and securities industries (29 U.S.C. § 1144(b)(2)(A) (1988)), and plans adopted pursuant to state worker’s compensation, unemployment compensation and disability insurance laws from ERISA coverage (29 U.S.C. § 1103(b)(3) (1988)).

234. As Justice Brandeis warned, “[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences for the Nation.” New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
the needs of workers and their dependents. This danger arises because ERISA's preemptive language is unusually broad, extending to virtually all state laws that "relate to" employee benefit plans. Congress did not intend ERISA to preempt family and medical leave legislation, and, consistently with the policy of reserving the regulation of employment-related safety next to the states, should amend ERISA to exempt state family and medical leave acts from its preemptive reach.