Members Brief

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NLRA Preemption of State and Local Labor Regulations

The National Labor Relations Act (NLRA) contains no express preemption provision. Nevertheless, the U.S. Supreme Court has developed two preemption doctrines regarding the statute. The first doctrine reflects the Court's view that the National Labor Relations Board, the agency that administers the NLRA, has primary jurisdiction over private sector labor relations. The second recognizes that Congress intended for certain bargaining-related tactics to remain unregulated.

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Introduction

The National Labor Relations Act (NLRA) is a federal law governing the relationship between employers, employees, and labor organizations (typically, unions) in the private sector.[1] It covers a broad range of labor-related issues, including:

[1] The NLRA also is known as the Wagner Act. Private sector labor relations are also governed by two other laws: (1) the Labor-Management Relations Act (29 United States Code (U.S.C.) 141 *et seq*.), also known as the Taft-Hartley Act, which sets forth the general requirements governing employer and employee relations, and (2) the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 *et seq*.), also known as the Landrum Griffith Act, which requires labor organizations to make certain financial disclosures.

- Employees' rights to form, join, or assist a labor organization (or to refrain from doing so, subject to an agreement requiring membership);
- Employees' rights to collectively bargain (or not) with their employers through a chosen representative and to engage (or not) in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and
- Unfair labor practices by employers and labor organizations, including restraining, coercing, or interfering with employees in the exercise of NLRA-protected rights.[2]

When a state or local government attempts to regulate private sector labor relations, the doctrine of preemption can prevent interference with the NLRA-established framework.

NLRA Preemption

The Supremacy Clause of the U.S. Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[3]

Under the Supremacy Clause, a state or local regulation is overridden (preempted) by federal law in any of the following circumstances:

- Congress explicitly expresses in an enactment its intent to preempt state or local regulation (express preemption);
- The state or local government seeks to regulate conduct in a field that Congress has determined the federal government should exclusively regulate (field preemption);
- The state or local regulation conflicts with federal law (conflict preemption).[4]

The NLRA does not expressly preempt state laws or local ordinances. It does, however, preclude additional restrictions on private sector labor relations, unless Congress presumably contemplated those restrictions. Federal courts apply two doctrines when determining if a state or local regulation is preempted by the NLRA. The first doctrine (known as "*Garmon* preemption") prohibits state and local regulation of activities that the NLRA protects, prohibits, or arguably protects or prohibits.[5] The second doctrine (known as "*Machinist* preemption") prohibits regulation of labor issues that Congress left unregulated because of their importance to the collective bargaining process.[6]

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[2] 29 U.S.C. 157 and 158.

[3] U.S. Constitution, Article VI, Clause 2.

[4] *English v. General Electric Company,* 496 U.S. 72, 78-79 (1990).

[5] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Wisconsin Department of Industrial Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986).

[6] *International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 147-149 (1976).

Garmon preemption

Garmon preemption arises from the 1959 U.S. Supreme Court case *San Diego Building Trades Council v. Garmon*. It prevents state and local regulation of activities that are arguably within the jurisdiction of the NLRA, such as union organizing and picketing. Under *Garmon*, if an activity is covered by the NLRA, or is closely related to an NLRA-regulated activity, state and local governments cannot impose their own regulations on that activity.

Garmon background

In *Garmon*, a construction union asked a business to agree to hire only union members or individuals who joined the union 30 days after hire. The business owner refused, and the union's members began peacefully picketing outside of the business. The business owner sued the union under the state's unfair labor practice law. The state court awarded the business an injunction and damages for lost business caused by the picketing.[7]

On appeal, the U.S. Supreme Court held that where it is clear (or may clearly be assumed) that an activity that a state regulates or prohibits is protected or prohibited by the NLRA, then state power must yield to the NLRA. Since peaceful, nontrespassory picketing is within the scope of rights protected by the NLRA, the state's ability to regulate or prohibit it was preempted. *Garmon* preemption applies whether a state acts through a general law applicable to everyone or through a specific law intended to regulate employer-employee relations.[8]

Although it is often framed in broad terms, *Garmon* preemption has limits. *Garmon* preemption is intended to prohibit state and local interference with federal interpretation and enforcement of the labor policies expressed in the NLRA. Regulations peripheral to federal labor policy or that "touch[] interests deeply rooted in local feeling and responsibility" are not preempted by *Garmon*.[9]

Under *Garmon*, a court must balance the importance of the state or local government's asserted interest against potential harms to the NLRA regulatory scheme. Harms to the NLRA regulatory scheme have been framed in two ways. First, state and local actions affecting labor relations can negate the federal government's exclusive jurisdiction over private-sector collective bargaining. Second, state and local regulations can create conflicting standards for employers, employees, and unions.[10]

Garmon applied

The critical inquiry is whether the issue arising under the state law or local ordinance is identical to or different from the issue that could be presented to the National Labor Relations Board (NLRB), the federal entity that enforces the NLRA.[11]

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[7] *Garmon* at 237-238.

[8] *Garmon* at 244-246.

[9] *Garmon* at 243-244; see also *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983).

[10] *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 676 (1983).

[11] *Sears v. San Diego County District Council of Carpenters,* 436 U.S. 180, 197 (1978).

For example, in the 1978 case *Sears v. San Diego Council of Carpenters*, a union protesting a business's use of nonunion carpenters picketed on the business owner's property. The owner sued in state court seeking an injunction against the union's activity on the grounds that the picketing violated state trespass laws.

The U.S. Supreme Court held that the state-law trespass claim was not preempted. According to the Court, a state has a significant interest in protecting its citizens' real property rights. Furthermore, state enforcement of the trespass claim presented little risk of interfering with the NLRB's jurisdiction over any claim related to unfair labor practices.[12]

Machinist preemption

Named for the 1976 case *International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, *Machinist* preemption addresses state and local actions that unreasonably interfere with the balance of power between employers and organized labor.

Machinists background

In *Machinists*, an employer lawfully terminated a collective bargaining agreement and began negotiating a replacement contract with a machinists' union. Under the terminated agreement, the basic workweek had been 37.5 hours. The employer wanted the new contract to require a 40-hour workweek. While negotiations were ongoing, the employer attempted to implement its desired workweek requirement. In opposition to the change, the unionized employees voted to refuse all assigned overtime until a new agreement was approved. The employer filed an unfair labor practice charge with the NLRB and with the state's labor relations commission.

The NLRB found the union's refusal to work overtime did not violate the NLRA and dismissed the federal charge. The state commission, however, ruled the union's refusal to work overtime violated state law. It also determined refusing to work overtime was neither protected nor prohibited by the NLRA; and, therefore, the state law was not preempted under *Garmon*. As a result, the state commission ordered the employees to stop refusing assigned overtime.[13]

In overturning the state commission's order, the U.S. Supreme Court stated that Congress intended for certain self-help activities to remain unrestricted by any government regulation. Strikes, lockouts, and other "economic weapons" used to force a party to negotiate are "part and parcel" of the collective bargaining process. By prohibiting certain self-help measures as unlawful labor practices while leaving others untouched, Congress struck a balance between management and labor and closed it to further state or local regulation.[14]

Although *Machinists* related to a self-help measure used by employees (refusing overtime), the Court noted an employer also has a right to use protected economic weapons to bolster its bargaining position. State and local governments may not prohibit an employer from

[12] *Sears* at 182-183, 196-198.

[13] *Machinists* at 133-135.

[14] *Machinists* at 142-146.

using pressure tactics. They also may not add to the employer's federal legal obligations when bargaining with unionized employees.[15]

Machinists applied

The crucial inquiry regarding *Machinist* preemption is whether state action to curtail or prohibit an employer or union from resorting to self-help measures would frustrate effective implementation of the bargaining process laid out by the NLRA.[16]

For example, in *Golden State Transit Corporation v. Los Angeles*, the U.S. Supreme Court ruled in 1986 that *Machinists* preempted a local ordinance conditioning a taxicab business's license renewal on the settlement of a labor dispute by a certain date. According to the Court, the ordinance effectively imposed a deadline for resolving a labor negotiation. The NLRA merely requires the parties to a labor dispute to bargain in good faith. It does not require the parties to come to an agreement within a specified time or at all. Therefore, the deadline was preempted as an impermissible additional obligation on the employer.[17]

Machinists does not preempt all state statutes affecting economic weapons used in collective negotiations. The U.S. Supreme Court has upheld state statutes that only indirectly impact the collective bargaining process by imposing minimum state labor standards.

For example, the Court found that *Machinists* did not preempt a state statute requiring all employer-provided health insurance plans, including collectively bargained plans, to provide minimum mental health benefits. According to the Court, the NLRA's purpose is to remedy inequality in bargaining power between employees and employers. Minimum state labor standards that apply to all employees (union and nonunion) neither encourage nor discourage the collective-bargaining processes with which the NLRA is concerned. Therefore, minimum labor standards are not subject to *Machinist* preemption.[18]

The Court has also found *Machinists* does not prohibit a state from affecting the relationship between employees, employers, and unions when the state purchases services. In the case known as "Boston Harbor," a group of labor unions entered a project labor agreement (PLA) with a city for the completion of a specific public construction project. The PLA recognized a particular union as the exclusive representative for project employees and required them to become members within seven days after hire.[19]

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[15] *Machinists* at 147.

[16] *Machinists* at 147-148.

[17] *Golden State Transit Corporation v. Los Angeles*, 475 U.S. 608, 615-617 (1986).

[18] *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751-754 (1985) (overturned on other grounds).

[19] *Building and Construction Trades Council v. Associated Builders & Contractors (Boston Harbor)*, 507 U.S. 218, 221-222 (1993). It should be noted the NLRA specifically protects the use of PLAs in the construction industry. State regulations on PLAs that are inconsistent with the NLRA may be preempted under *Garmon*. See, e.g., *Ohio State Building and Construction Trades Council v. Cuyahoga County Board of Commissioners,* 98 Ohio St.3d 214, ¶ 58-59 (2002).

An organization representing nonunion construction industry employers sued the city arguing the PLA was preempted under *Machinists*. The organization argued the PLA regulated an activity (the decision to join a union) that Congress intended should be left unrestricted by government power.

The U.S. Supreme Court ruled the PLA was not a government regulation affecting the collective bargaining process. It was a valid contract for completion of an individual construction project entered into by the city. It was not a regulation applicable to all construction projects. As a result, it was not preempted under *Machinists* or (*Garmon*).[20]

Additional examples

The U.S. Supreme Court has addressed the issue of NLRA preemption in a variety of cases. The following list provides additional examples in which the Court has applied the doctrine in labor-related cases and summarizes the Court's holding and reasoning. It should be noted that the preemption analysis can be highly fact specific. A general law can be valid in numerous situations but be preempted when applied to labor-management relations:

- **Union member's rights against union:** A state law allowing a union member to sue a union for violating rights granted to the member under the union's constitution and bylaws is *not preempted* because the NLRA does not regulate contractual rights between a union and its members.[21]
- **Defamatory speech:** A state law prohibiting defamatory speech is *not preempted* when applied to false statements published during a labor dispute, provided the statements were made with knowledge of their falsity or with reckless disregard for the truth. However, the NLRA does *preempt* state prohibitions against labor-related, defamatory speech that falls short of deliberate or reckless untruth.[22]
- **Unemployment benefits:** A state law allowing employees who are unemployed due to a strike to receive unemployment benefits is *not preempted* because the NLRA and federal unemployment compensation laws imply that Congress intended that each state be free to authorize or prohibit unemployment benefits for striking workers.[23]
- **Debarment from public contracts:** A state law prohibiting state agencies from contracting with an employer found by the NLRB to have violated the NLRA three times within a five-year period *is preempted* because the effect of the law is enforcement of the NLRA, which interferes with the NLRB's jurisdiction.[24]

[20] *Boston Harbor* at 231-233.

[21] *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958).

[22] Compare *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (defamation claim not preempted) with *Old Dominion Branch v. Austin*, 418 U.S. 264 (1974) (defamation claim preempted).

[23] *New York Telephone Company v. New York State Department of Labor*, 440 U.S. 519 (1979).

[24] *Wisconsin Department of Industrial Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986).

- **Advocacy for (or against) labor organizations:** A state law prohibiting an employer that receives state funds from using the funds to assist, promote, or deter union organizing *is preempted* because the NLRA requires free debate on labor-management issues and prohibits regulating noncoercive speech about unionization.[25]
- **Personal property protection:** A state law prohibiting property destruction is *not preempted* when applied to striking workers. The NLRA right to strike is not absolute. Strikers must take reasonable steps to protect an employer's property from foreseeable, aggravated, and imminent danger that can arise from suddenly stopping work.[26]

[25] *U.S. Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

[26] *Glacier Northwest, Inc., v. International Brotherhood of Teamsters Local Union No. 174*, 598 U.S. 771 (2023).