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State of Minnesota
In Supreme Court

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,
Appellant,

vs.

GENERAL DYNAMICS ADVANCED INFORMATION SYSTEMS, INC
Respondent,

and

THOMAS V. ENGFER,
Respondent.

APPELLANT-DEPARTMENT'S BRIEF

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LEGAL ISSUES

1. The federal Employee Retirement Security Act (“ERISA”) does not govern private employee benefit plans “maintained solely for the purpose of complying with applicable . . . unemployment compensation . . . laws.” General Dynamics Advanced Information Systems, Inc. maintains a private supplemental unemployment benefit (“SUB”) plan solely for the purpose of paying its laid-off workers money which would not disqualify them from receiving state benefits under applicable state unemployment compensation laws. Does ERISA govern this plan?

The Court of Appeals held that ERISA governs the General Dynamics Plan.

Most apposite statutes:

29 U.S.C. § 1003(b)(3)

Minn. Stat. § 268.035, subd. 29(12) (2012)

Minn. Stat. § 268.085, subd. 3 (2012)

Most apposite cases:

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)

2. ERISA does not preempt state laws that have only a tenuous, remote, or peripheral connection with employee benefit plans governed by ERISA. A provision in the Minnesota unemployment insurance law sets out the circumstances under which payments made from a SUB plan will be used in calculating an employer’s taxable wage base. These are the same circumstances under which payments from a SUB plan will delay an individual’s state unemployment benefits. If the General

Dynamics plan is found to be governed by ERISA, does ERISA preempt the Minnesota provision?

The Court of Appeals held that ERISA preempts the Minnesota provision.

Most apposite statutes:

29 U.S.C. 1144(a)

Minn. Stat. § 268.035, subd. 29(12) (2012)

Minn. Stat. § 268.085, subd. 3 (2012)

Most apposite cases:

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STATEMENT OF THE CASE

Thomas Engfer was laid off in December 2011. He applied for unemployment benefits and told the Minnesota Department of Employment and Economic Development (“the Department”) that he was not going to receive severance from his former employer. Engfer then received full state unemployment benefits for several months.

During that same period, Engfer was receiving payments from a supplemental unemployment benefits (“SUB”) plan maintained by his former employer, General Dynamics, for its laid off workers. In 2013, when the Department learned about these payments, a Department administrative clerk determined that the SUB payments should have delayed Engfer’s state unemployment benefits by several weeks. Engfer was held to have been overpaid state unemployment benefits. Engfer appealed and an

Unemployment Law Judge (“ULJ”) held a de novo hearing. The ULJ held that under the Minnesota Unemployment Insurance Law, the payments Engfer received were “wages” which delayed his eligibility for state unemployment benefits for several weeks.¹ Engfer requested reconsideration and the ULJ affirmed her decision.²

Engfer then appealed to the Court of Appeals. A divided Court of Appeals reversed. It held that ERISA governed General Dynamics’ SUB plan and that ERISA therefore preempted Minnesota’s “wages” provision dealing with SUB plans.³ The Department petitioned this Court for review, and the petition was granted.

STATEMENT OF FACTS

Thomas Engfer was employed by General Dynamics Advanced Information Systems, Inc. as a software developer until December 16, 2011.⁴ At the end of his employment, he was earning an annual salary of \$92,000.⁵

Engfer was laid off from General Dynamics as part of a workforce reduction.⁶ He was offered the chance to participate in the “General Dynamics Corporation Employee Transition Benefit Plan” (“the General Dynamics Plan” or “the Plan”).⁷ The Plan was

¹ Appendix to Department’s Brief, A22-A26.

² Appendix, A18-A21.

³ *Engfer v. Gen. Dynamics Advanced Info. Sys., Inc.*, 844 N.W.2d 236 (Minn. App. 2014) (Appendix, A1-A17).

⁴ T. 12, 13. Transcript references will be indicated with a “T,” followed by the page number. Exhibits in the record will be indicated with an “E,” followed by the exhibit and page numbers.

⁵ T. 13.

⁶ T. 13.

⁷ T. 13-14; E-6, p. 3.

established to supplement state unemployment benefits.⁸ Engfer would receive supplemental payments from the plan, so that the sum of the state benefit and the supplemental payment each week would add up to Engfer's previous weekly salary.⁹ This would continue for up to 26 weeks.¹⁰ As a condition for receiving any money under the plan, Engfer was required to sign a general release.¹¹

General Dynamics hired a company called Total Management Solutions, Inc. ("TMS") to process payments under the Plan. TMS told Engfer he had to apply for state unemployment insurance benefits.¹² To be eligible for payments from the General Dynamics Plan, he had to be eligible for and be paid state benefits.¹³ There were, however, a few exceptions to this rule. Under the Plan, Engfer would receive a payment equal to his full weekly salary during the state's non-payable or waiting week, during which no state benefits are paid.¹⁴ If his state unemployment benefits ran out before he exhausted the supplemental payments, or he didn't have enough earnings based on which he could qualify for state benefits in the first place, he would still collect payments under the General Dynamics Plan, in the amount of his full weekly salary.¹⁵ He would receive the supplemental payments even if he decided to take an indefinite amount of "time off,"

⁸ In Minnesota, unemployed workers can receive weekly state benefits that amount to half of their average weekly wage, up to a current state maximum of \$629. MINN. STAT. § 268.07, subd. 2a (2012).

⁹ E-6, p. 3.

¹⁰ E-6, p. 6.

¹¹ *Id.*

¹² E-6, p. 3.

¹³ E-6, pp. 4, 10.

¹⁴ E-6, p. 10.

¹⁵ *Id.*

“with no plans to initially seek employment.”¹⁶ TMS told Engfer that even in those weeks, despite having removed himself from the labor market, he would still be eligible for both the state unemployment benefit and the supplemental benefit.¹⁷ Engfer applied for and received both state unemployment benefits and SUB pay from the General Dynamics Plan for several months, and exhausted his SUB benefits.

When the Department later learned about these payments, a question was raised as to how they should be treated for purposes of the Minnesota Unemployment Insurance (“UI”) Law. Minnesota UI Law defines “wages” for two purposes. The first is to determine which payments are included in an employer’s taxable wage base. State unemployment benefits in Minnesota are financed entirely through unemployment taxes levied on employers. The amount an employer pays in taxes every year depends partly on the amount it has paid in wages to its employees.¹⁸ The second reason for defining “wages” is to determine which payments delay an unemployed individual’s state UI benefits and which ones don’t.¹⁹

Severance is considered “wages,”²⁰ and is therefore included in the calculation of the employer’s taxable wage base. Receiving severance also delays a person’s eligibility for state unemployment benefits.²¹ Certain kinds of supplemental unemployment benefit (“SUB”) payments, on the other hand, are not considered “wages” under the Minnesota

¹⁶ E-6, p. 3.

¹⁷ *Id.*

¹⁸ MINN. STAT. § 268.035, subd. 24 (2012); MINN. STAT. § 268.051, subd. 1(a) (2012).

¹⁹ MINN. STAT. § 268.085, subd. 3 (2012).

²⁰ MINN. STAT. § 268.035, subd. 29(a) (2012).

²¹ MINN. STAT. § 268.085, subd. 3(a) (2012).

UI Law. SUB pay is not considered “wages” when it is paid under a SUB plan which provides “supplemental payments solely for the supplementing of weekly” public unemployment benefits, “only for those weeks the applicant has been paid” public unemployment benefits, and only in an amount that, when added to the person’s public UI benefits, doesn’t exceed his regular weekly salary.²² In addition, to be exempt from “wages,” the SUB pay must come from a plan that doesn’t require any consideration from the laid off worker and is “not designed for the purpose of avoiding” Social Security or unemployment taxes.²³

Because the General Dynamics Plan provided “supplemental” payments even in situations where the laid-off employee was not paid any state UI benefits (such as when the person didn’t qualify for state UI to begin with), the unemployment law judge held that the supplemental payments were “wages” under Minnesota law. The Court of Appeals reversed and held that ERISA preempted part of Minnesota’s “wages” provision dealing with SUB plans.

STANDARD OF REVIEW

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the ULJ’s decision, remand to the ULJ for further proceeding, reverse, or modify the decision if the petitioner’s substantial rights were prejudiced because the decision of the ULJ violated the constitution, was in excess of the statutory authority or jurisdiction, was based on an unlawful procedure, was affected by error of law, was unsupported by

²² MINN. STAT. § 268.035, subd. 29(a)(12) (2012).

²³ *Id.*

substantial evidence, or was arbitrary or capricious.²⁴ The Minnesota Supreme Court may review decisions of the Court of Appeals.²⁵

The only question in this case is one of law, upon which the reviewing court remains “free to exercise its independent judgment.”²⁶

ARGUMENT

Under the Minnesota UI Law, an applicant’s unemployment benefits are delayed or reduced for any week if he receives severance or other payments from his employer after separation from employment, but only if the payments are considered “wages” at the time of payment.²⁷ The following are not “wages” under the Minnesota UI Law:

payments made to supplement unemployment benefits under a plan established by an employer, that makes provisions for employees generally or for a class or classes of employees under the written terms of an agreement, contract, trust arrangement, or other instrument. The plan must provide supplemental payments solely for the supplementing of weekly state or federal unemployment benefits. The plan must provide supplemental payments only for those weeks the applicant has been paid regular, extended, or additional unemployment benefits. The supplemental payments, when combined with the applicant’s weekly unemployment benefits paid, may not exceed the applicant’s regular weekly pay. The plan must not allow the assignment of supplemental payments or provide for any type of additional payment. The plan must not require any consideration from the applicant and must not be designed for the purpose of avoiding the payment of Social Security obligations, unemployment taxes on money disbursed from the plan.²⁸

²⁴ MINN. STAT. § 268.105, subd. 7(d) (2012).

²⁵ MINN. STAT. § 480A.10, subd. 1 (2012).

²⁶ *Lolling v. Midwest Patrol*, 545 N.W. 2d 372, 377 (Minn. 1996)

²⁷ MINN. STAT. § 268.085, subd. 3(a) (2012).

²⁸ MINN. STAT. § 268.035, subd. 29(a)(12) (2012).

Because the payments from the General Dynamics Plan differ in several respects from those outlined in the above provision, they are “wages” under the Minnesota UI Law. Engfer cannot rightfully collect state unemployment benefits for the weeks that he is also receiving these payments (“wages”). And General Dynamics cannot decrease its unemployment tax liability by excluding these payments from its taxable wage base.

The Court of Appeals incorrectly concluded that ERISA governs the General Dynamics Plan. It further erred when it held that ERISA preempts part of the above provision. A brief account of the origins of SUB plans, as well as an analysis of ERISA’s provisions, is necessary to understand why ERISA is inapplicable to this SUB plan, and why, at the very least, it doesn’t preempt Minnesota Unemployment Insurance Law.

I. ERISA does not govern this plan.

The question of preemption only arises if a plan is covered by ERISA.²⁹ Section 4(b)(3) of ERISA states that ERISA does not cover plans “maintained solely for the purpose of complying with applicable workmen’s compensation laws or unemployment compensation or disability insurance laws.”³⁰ As discussed below, the General Dynamics Plan is a plan maintained solely for the purpose of complying with applicable unemployment compensation laws. It is therefore not covered by ERISA.

²⁹ 29 U.S.C. § 1144(a).

³⁰ 29 U.S.C. § 1003(b)(3).

a. SUB plans must, by necessity, be integrated with state unemployment compensation laws.

Supplemental unemployment benefits first appeared in the United States in 1955,³¹ at a time when strikes plagued the auto industry and state unemployment compensation was seen by many as inadequate to sustain workers during the industry's seasonal layoffs. The United Automobile Workers wanted a guaranteed annual wage to protect workers during layoffs.³² After 70,000 Ford workers went on strike, the company and the union reached a compromise in June 1955: a supplemental unemployment benefit plan.³³ Under this plan, the employer would put a few cents into a trust fund for each hour that an employee worked. In the event of a layoff, the worker would receive payments from the fund for a number of weeks.³⁴ These payments were intended to be over and above the unemployment compensation the worker received from the state, and each payment was conditioned upon proof that the worker had already received the state benefit for the week.³⁵ The combined state and company-paid benefits would add up to a certain percentage of the worker's regular weekly take-home pay—65 percent for the first four weeks, and 60 percent thereafter.³⁶

The Ford Plan proved to be a turning point, and employers in other industries as well as other auto manufacturers quickly followed suit. In 1956, the Internal Revenue

³¹ BUREAU OF NATIONAL AFFAIRS, SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLANS 3 (1956).

³² *Id.* at 1.

³³ *Id.*

³⁴ *Id.* at 3.

³⁵ *Id.* at 3, 77.

³⁶ *Id.*

Service issued a ruling which exempted employer contributions to SUB plans from FICA and federal unemployment taxes if the SUB plan met certain conditions.³⁷ The potential tax savings made SUB plans a much more attractive option for employers than traditional severance, and created a powerful incentive for employers who had not previously offered SUB plans to start doing so.

From the beginning, however, employers fully recognized that supplementation (i.e., receipt of full state benefits concurrently with private supplemental benefits) had to be permitted by state UI law, and if it wasn't, they would have to make alternative payment arrangements that wouldn't interfere with the worker's eligibility for state unemployment benefits.³⁸ Employers knew that under the UI law of every state, certain types of payments made to a laid-off worker either delayed the worker's eligibility for state unemployment benefits, or reduced the weekly amount which he could collect in state unemployment benefits. This was intended to prevent double payments—both private and public—and to preserve UI benefits for those who needed them the most, the theory being that employees who were already protected through private contracts did not need state protection for the same period.³⁹ Recognizing this, the Ford Motor Company plan stated:

State Integration Essential. Integration with State Unemployment Compensation systems is an essential condition to the effectiveness of the

³⁷ Rev. Rul. 56-249, 1956-1 C.B. 488.

³⁸ See BUREAU OF EMPLOYMENT SECURITY, U.S. DEPARTMENT OF LABOR, SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLANS AND UNEMPLOYMENT INSURANCE 10-11 (1957).

³⁹ See BUREAU OF NATIONAL AFFAIRS, SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLANS 80.

Ford Supplemental Unemployment Benefit Plan. Before the benefit payments can start, rulings must be obtained in states in which the Company has two-thirds of its hourly working force that simultaneous payment of a Plan benefit shall not reduce or eliminate the State Unemployment Compensation benefit for the same week. . . . If appropriate rulings are not obtained from the home states of two-thirds of the employees before June 1, 1957, the Plan will be terminated as of that date.⁴⁰

Many other companies put similar provisions in their SUB plans.⁴¹

In response to the growing popularity of SUB plans and the uncertainty surrounding their integration with state UI law, states confronted the question of whether payments under SUB plans were “wages” (or “remuneration”) which would reduce or delay weekly state benefits under their respective unemployment compensation statutes.⁴² Addressing this question also meant deciding whether the SUB payments would count in the calculation of the employer’s unemployment tax liability, because all states financed unemployment benefits through unemployment taxes levied on employers. Between 1956 and 1958, 42 states addressed the question by amending their statutes or issuing administrative agency rulings or attorney general opinions on specific plans.⁴³ Most states, including Minnesota, permitted supplementation, but several prohibited it.⁴⁴ Of the states which permitted supplementation of state UI benefits, some allowed it only for

⁴⁰ *Id.* at 76-77. The Ford plan went on to state that if the necessary rulings were obtained in two-thirds of the state but not in the remaining states where Ford had employees, an alternative payment structure for the latter states would be implemented, so as not to interfere with state benefits in those states.

⁴¹ *Id.* at 38, 40.

⁴² See BUREAU OF EMPLOYMENT SECURITY, U.S. DEPARTMENT OF LABOR, SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLANS AND UNEMPLOYMENT INSURANCE 11, 14 (1957).

⁴³ *Id.* at 11.

⁴⁴ *Id.* at 14.

certain types of SUB plans and prohibited it for others.⁴⁵ It is worth noting that the rulings and attorney general opinions were specific to the plans employers had submitted to the states for approval.⁴⁶ Each ruling or opinion applied the state UI law to the specific plan under review, by analyzing that plan's salient features.⁴⁷

A number of states later amended their unemployment compensation statutes to address SUB plans. Some states adopted laws that require employers to obtain advance approval for their SUB plans from the agency responsible for administering the UI statute, before the SUB pay can be excluded from the state's definition of "wages."⁴⁸ Others, like Minnesota and Colorado, did not require explicit pre-approval but listed in their statutes the conditions under which supplementation was permitted.⁴⁹ Regardless of whether a state requires advance approval for individual SUB plans, one thing remains clear: supplementation of state benefits through SUB plans must be permitted under state unemployment compensation laws.

⁴⁵ Jack Chernick & Charles Naef, *Legal and Political Aspects of the Integration of Unemployment Insurance and SUB Plans*, 12 INDUS. & LAB. REL. REV. 1 (1958).

⁴⁶ BUREAU OF NATIONAL AFFAIRS, SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLANS 79-95.

⁴⁷ *Id.*

⁴⁸ OKLA. STAT. tit. 40, §§ 1-218(7) and 1-225(E). *See also* PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, OFFICE OF UNEMPLOYMENT COMPENSATION BENEFITS, STATE UNEMPLOYMENT COMPENSATION AND SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLANS (2012) (Appendix, A27-A28).

⁴⁹ MINN. STAT. § 268.035, subd. 29(12) (2012); COLO. REV. STAT. § 8-70-142 (plan must not provide an option for lump sum payment). The Oklahoma statute also lists the conditions the plan must meet to be approved. OKLA. STAT. tit. 40, § 1-218(7) (plan must provide for equal treatment of all employees covered by the plan).

b. ERISA exempts SUB plans from its coverage as plans maintained solely for the purpose of complying with applicable unemployment compensation laws.

Congress enacted ERISA in 1974 to fix serious abuses and mismanagement which plagued the private pension system.⁵⁰ ERISA provides standards for reporting, disclosure, and fiduciary responsibility for those who administer pension or fringe benefit plans.⁵¹ It also provides participation, vesting, and funding standards for pension plans. ERISA governs most employee benefit plans, including any plan, fund, or program established or maintained for the purpose of providing, “through the purchase of insurance or otherwise,” “benefits in the event of ... unemployment.”⁵² This generally includes severance plans.⁵³ But Congress didn’t intend to regulate all employee benefit plans through ERISA. It exempted from ERISA’s coverage those plans “maintained solely for the purpose of complying with applicable workmen’s compensation laws or unemployment compensation or disability insurance laws,”⁵⁴ leaving those plans to be regulated by the states.

The precise meaning of and reason for this exemption are unclear from the legislative history of ERISA.⁵⁵ The provision is traceable to ERISA’s predecessor law,

⁵⁰ Pub. L. No. 93-406, 88 Stat 829 (Sept. 2, 1974), *codified at* 29 U.S.C. § 1001 *et seq.*

⁵¹ 29 U.S.C. § 1001(b).

⁵² 29 U.S.C. § 1002(1) and (3).

⁵³ *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 520 n.4 (8th Cir.1988) (“[c]ourts have uniformly held that unfunded severance pay plans are an ‘employee welfare benefit plan’ covered by ERISA”).

⁵⁴ 29 U.S.C. § 1003(b).

⁵⁵ *See Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287, 1305 (2d Cir. 1981), opinion vacated in part on reh’g, 666 F.2d 21 (2d Cir. 1981) and aff’d in part, vacated in part sub nom. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

the Welfare and Pension Plans Disclosure Act of 1958 (“the Disclosure Act” or “the 1958 Disclosure Act”).⁵⁶ The Disclosure Act exempted from its coverage any plan that “is established and is maintained solely for the purpose of complying with applicable workmen’s compensation laws or unemployment compensation disability insurance laws.” It is possible that the Disclosure Act’s exemption provision was concerned partly with disability insurance plans maintained to comply with state laws which combined unemployment compensation and disability insurance under a single statutory and administrative scheme (hence the reference to “unemployment compensation disability insurance laws”). Some states had begun combining their unemployment compensation and disability insurance programs in the 1940s and 50s, so that both types of benefits would be paid out of the same state fund.⁵⁷ A few of those states gave employers the option of establishing state-approved private plans to provide disability insurance, in lieu of contributing to the state-administered fund through payroll taxes.⁵⁸ No such option existed for unemployment compensation, however; employers were still required to pay UI taxes and couldn’t avoid doing so by establishing private unemployment compensation plans.⁵⁹

⁵⁶ Pub. L. No. 85-836, 72 Stat. 997 (Aug. 28, 1958), *codified at* 29 U.S.C. §§ 301-309, *repealed by* ERISA, Pub. L. No. 93-406, §111(a)(1), 88 Stat. 829, 851 (Sept. 2, 1974), *adding* 29 U.S.C. § 1031(a)(1).

⁵⁷ Alfred M. Skolnick, U.S. Social Security Administration, “Temporary Disability Insurance Laws in the United States,” October 1952.

⁵⁸ *Id.*

⁵⁹ Margaret M. Dahm, “Temporary Disability Insurance: The California Program,” February 1953.

ERISA, enacted 16 years after the Disclosure Act, has several additional exemptions not contained in the earlier law.⁶⁰ ERISA also changed the language of the exemption provision it inherited from the Disclosure Act. Under ERISA, a plan maintained solely to comply with applicable unemployment compensation laws is exempt, as is a plan maintained solely to comply with applicable disability insurance laws. The change in language is significant, because state UI laws differ from state disability insurance laws (and from state workers' compensation laws) in one key respect: no state requires employers to maintain private unemployment compensation plans, and no state allows employers to meet their obligations under UI law by maintaining private plans.⁶¹ Unlike disability insurance and workers' compensation, unemployment benefits in all states are financed through payroll taxes imposed on employers (and, in a handful of states, also on employees).⁶² The only possible interpretation of "plans maintained

⁶⁰ 29 U.S.C. § 1003(b).

⁶¹ See *Kramarsky*, 650 F.2d 1287, 1305-1306.

⁶² Not all employers have to pay unemployment taxes. States allow government and nonprofit employers to be reimbursing employers (as opposed to taxpaying employers). Instead of paying unemployment taxes, a reimbursing employer receives a bill from the state after each calendar quarter in which unemployment benefits were paid to its former employees. The employer then pays to the state, dollar-for-dollar, the amount of benefits the state paid to its former employees that quarter. Although some states require reimbursing employers to post surety bonds, a surety bond is not an "employee benefit plan." For an employee benefit "plan" to exist, as that term is used in ERISA, there must be an ongoing administrative scheme or "set of administrative practices" for "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." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 (1987). A surety bond for a reimbursing employer does not have any of these features, because all the administrative burden is still on the state agency administering the state UI fund. A surety bond is

solely for the purpose of complying with applicable unemployment compensation laws” is SUB plans.

Under the federal-state unemployment benefit system, the states are given broad discretion in designing their UI programs. States determine the eligibility conditions for public unemployment benefits. Duration of eligibility and weekly benefit amounts are likewise determined under state law. Each state defines for itself which payments—severance, pension, workers’ compensation, part-time earnings, etc.—will delay a person’s state benefits. It is for the state to decide whether it will permit supplementation, and if so, to what extent and under what conditions. State UI laws will therefore always be “applicable” to any private SUB plan. As demonstrated above, SUB plans have had to seek sanction for supplementation under state UI laws since their inception. It is perplexing, then, that the Court of Appeals has turned this long-standing principle on its head and subordinated state UI law to the terms of individual SUB plans.

If Minnesota were to follow the example of Oklahoma, Pennsylvania, and other states which require prior approval of SUB plans before allowing supplementation, then an employer in Minnesota would have to draft its plan in accordance with Minnesota UI provisions on SUB plans. It would have to submit its plan to the Department for approval. The Department would review the plan and decide if the plan met the statutory conditions for supplementation. The plan would be effective only if the Department gave explicit approval. If the Department did not approve the plan, the plan would not be able

therefore not an employee benefit “plan, fund, or program,” and is not what Congress contemplated when drafting ERISA’s coverage and exemption provisions.

to carry out its purpose of supplementing state unemployment benefits. That scenario would permit no other conclusion than that the plan was maintained solely for the purpose of complying with applicable Minnesota UI law. The result here should be no different. An advance-approval requirement is a mere procedural step which neither adds to nor takes away from the substance and effect of the law. Its absence is immaterial.

The fact that an employer is under no compulsion under the Minnesota UI Law to establish a SUB plan is of no consequence. The ERISA exemption does not contemplate only those plans which the employer is compelled to maintain under state laws. The exemption is not for plans “mandated by” state unemployment compensation laws, but for those “maintained solely for the purpose of complying with” those laws. Although several courts have proceeded on the assumption that SUB plans are governed by ERISA,⁶³ we have found no case that discusses the ERISA exemption for plans maintained solely to comply with applicable unemployment compensation laws. There is good reason for this: while many workers’ compensation and disability insurance laws require employers to either maintain private plans or pay into a state fund, there is no comparable system for unemployment compensation in any state. As explained above, SUB plans are the only conceivable interpretation of “plans maintained solely for the purpose of complying with applicable unemployment compensation laws.” There simply is no other kind of employee benefit plan that an employer would maintain to comply with the unemployment compensation law of any state.

⁶³ See, e.g., *Adams v. Gen. Tire & Rubber Co. Supplemental Unemployment Ben., Plan*, 794 F.2d 164, 166 (4th Cir. 1986); *1975 Salaried Ret. Plan for Eligible Employees of Crucible, Inc. v. Nobers*, 968 F.2d 401, 404 (3d Cir. 1992).

c. The General Dynamics Plan is maintained solely for the purpose of complying with state unemployment compensation laws.

The General Dynamics Plan seeks to supplement state unemployment benefits. That is its primary purpose. It is conditioned upon receipt of state unemployment benefits. Like any other SUB plan, it must be structured in a way so as to exclude the SUB payments from the state UI law's definition of "wages." It has to be integrated with the state unemployment compensation law.

While General Dynamics may have multiple reasons or motives for establishing a SUB plan, the employer's motive is not the test for determining whether a plan is maintained solely for the purpose of complying with applicable unemployment compensation laws.⁶⁴ Engfer might also argue that General Dynamics did not establish its SUB plan solely to comply with Minnesota UI law, as evidenced by its clear noncompliance. This argument, if accepted, would render ERISA's exemption provision meaningless. After all, if all plans were always fully compliant with applicable state unemployment compensation laws (or applicable worker's compensation or disability insurance laws), no plan would be challenged in any legal proceeding, or if it was challenged, the challenge would be quickly dismissed. The questions of ERISA coverage or preemption would not even arise.

ERISA coverage and preemption cannot depend solely on an employer's decision as to whether it will comply with state law. If an employer consciously designs its SUB plan to comply with applicable state UI law, then that plan is not covered by ERISA and

⁶⁴ See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 107 (1983).

the state law is not preempted. But if the employer chose to ignore applicable state law when designing its SUB plan, would this be enough to hold that the plan is not maintained solely to comply with state UI law and is therefore governed by ERISA? Surely ERISA's scope cannot expand or contract based solely on the whims of employers as to whether they will comply with applicable state laws. In *Employee Staffing Services, Inc. v. Aubry*, the Ninth Circuit considered ERISA's exemption provision and rejected the argument that a plan's noncompliance with a state workers' compensation law determines whether the plan is maintained solely to comply with the law. Holding that ERISA has not "opened a loophole,"⁶⁵ the Court explained:

Syntactically, the preemption of "laws" and exemption of "plans" might be construed to place the power to exempt in the employer's hands, when it adopts a plan, instead of the state legislature's hands, when it promulgates laws. But a construction which attributes a rational purpose to Congress makes this locus of power unlikely, because it would accidentally allow employers to avoid the century-old system of workers' compensation.⁶⁶

The rule applies with equal force to state unemployment compensation laws.

II. Even if ERISA governed the General Dynamics Plan, Minnesota's provision would not be preempted by ERISA.

If this Court is not persuaded that the General Dynamics Plan is maintained solely to comply with applicable unemployment compensation laws, then the question whether ERISA preempts the Minnesota provision insofar as it relates to the General Dynamics Plan would remain.

⁶⁵ 20 F.3d 1038, 1039 (9th Cir. 1994).

⁶⁶ *Id.* at 1041.

Section 514(a) of ERISA provides that ERISA supersedes any and all state laws “insofar as they may now or hereafter relate to any” plan covered by ERISA.⁶⁷ Although the language of this provision appears, at first blush, rather broad, ERISA preemption analysis is no different than any other preemption analysis.⁶⁸ The Court must be guided by the traditional principle of federalism and begin with the presumption that Congress does not intend to supplant state laws.⁶⁹

In interpreting ERISA’s preemption provision, the U.S. Supreme Court has recognized that “[i]f ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for ‘[r]eally, universally, relations stop nowhere . . .’”⁷⁰ The Court has therefore limited the preemptive sweep of ERISA, and held that some state laws may affect ERISA plans “in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.”⁷¹ The Court has recognized that

State laws which have only an indirect economic influence on ERISA-governed plans, and do not bind plan administrators in a particular way, preclude uniform administrative practice, or preclude provision of a uniform interstate benefit package, do not ‘relate to’ ERISA plans within the meaning of section 1144(a) and, thus, are not thereby preempted.⁷²

⁶⁷ 29 U.S.C. § 1144(a).

⁶⁸ *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. 86, 99 (1993).

⁶⁹ *N.Y. State. Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995).

⁷⁰ *Id.* at 655.

⁷¹ *Shaw* at 100 n. 21.

⁷² *California Div. of Labor Standards Enforcement v. Dillingham Const. N.A., Inc.*, 519 U.S. 316, 324 (1997) (citing *Travelers* at 659-50).

Other courts have also used various tests to identify the limits of ERISA preemption. The Fifth Circuit, for example, has a two-prong test: a state law claim is preempted if “(1) the claim addresses areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan, and (2) the claim directly affects the relationship among the traditional ERISA entities (i.e., plan administrators/fiduciaries and plan participants/beneficiaries).”⁷³ Regardless of the test used, there is no support for a conclusion that the Minnesota provision “relates to” SUB plans in a manner warranting preemption.

- a. The Minnesota provision does not address the worker’s right to receive SUB payments under the terms of the SUB plan, and does not affect the relationship among plan entities.**

The Minnesota “wages” provision is used to determine only three things: employer tax liability, an applicant’s ability to establish an unemployment benefit account, and the impact of private payments on an applicant’s collecting state benefits. None of these determinations affect the worker’s eligibility for SUB pay or the relationship between the SUB plan and the worker.

- i. Minnesota law does not interfere with ongoing SUB payments.**

The Minnesota provision in no way impedes or interferes with the operation of the General Dynamics Plan. Here is how the General Dynamics Plan and others like it work in Minnesota: the worker requests and receives state benefits for a given week. After

⁷³ *Hook v. Morrison Milling Co.*, 38 F.3d 776, 781 (5th Cir. 1994).

confirming that the worker received state benefits for that week, the SUB plan pays the worker for that same week. This continues as long as the worker receives state benefits and also meets eligibility requirements under the SUB plan (in this case, 26 weeks).

The Department must continue to pay state benefits to the worker as long as the worker meets state eligibility requirements. Because the worker can't apply for the SUB payment until after he has already received his state benefit for the week, the Department cannot deny the person state benefits simply because the worker *anticipates* receiving a SUB payment for that same week.⁷⁴

The majority opinion from the Court of Appeals ignored the Minnesota UI Law when it conjured up the following hypothetical scenario: “[H]ad DEED determined Engfer’s ineligibility for state unemployment benefits before any [SUB] benefits were paid, under the terms of the plan, which is premised on eligibility and receipt of state unemployment benefits, he would not have been entitled to any [SUB] benefits such that the plan would have been worthless, and Engfer would not have received the very benefits that made him ineligible for unemployment benefits.”⁷⁵

As illustrated above, the majority’s fears were unfounded. The scenario described by the majority is not possible under the Minnesota UI law, as it is interpreted and applied by the Department.⁷⁶ The Department cannot legally hold a person ineligible for

⁷⁴ MINN. STAT. § 268.085, subd. 3(a) (2012)(a) and (c) (an applicant’s state benefits are delayed “for any week with respect to which the applicant *is receiving, has received, or has filed for*” certain kinds of private payments) (emphasis added).

⁷⁵ *Engfer* at 238, n. 3.

⁷⁶ *Lolling*, 545 N.W.2d at 375 (the Department’s longstanding interpretation of the unemployment compensation statute is due some weight).

a week based on the mere *possibility* that the person will also receive some sort of private payment for that week. The Department pays first; only then does the person even become eligible to apply for a SUB payment for the same week.

ii. Minnesota law comes into operation after all SUB payments have ended.

When a worker receives any kind of payment from his employer after he has separated from employment, if the payment is “wages,” Minnesota looks to the total amount of the payments to be received to determine the time period for which the worker’s state benefits will be delayed. The Department divides the total amount of the payments by the worker’s last weekly salary, and the resulting number is the number of weeks by which the worker’s state benefits will be delayed.⁷⁷

An example will illustrate why the legislature chose this method. Employee Mary, who earns \$1,000 a week, is laid off by ABC Company. Mary applies for unemployment benefits. Her weekly unemployment benefit amount is \$500 (half of her last weekly salary). ABC wants to give Mary some kind of separation pay. It decides to give her a total of \$10,000. Under the Minnesota UI Law, the Department would divide \$10,000 (total payment to be received) by \$1,000 (last weekly salary), and delay Mary’s state benefits by ten weeks.

If Minnesota did not have this method in place, the period to which this payment applies could easily be manipulated: if ABC chose to give Mary \$500 a week for 20

⁷⁷ MINN. STAT. § 268.085, subd. 3(b)(1) (2012). (This subdivision was amended this year to make its provisions clearer. No changes were made to the provisions on calculating the period to which the payments should be applied.)

weeks (for a total of \$10,000), Mary's state benefits would be delayed by 20 weeks (i.e., she would receive \$0 in state benefits for 20 weeks because she is receiving a private payment equal to her weekly state benefit); on the other hand, if ABC and Mary agreed that she would get \$100 a week from ABC until she exhausted her eligibility for state benefits, and the rest of the amount as a lump sum afterward, Mary would receive \$400 in state benefits every week (weekly state benefit minus weekly separation payment). To prevent this kind of manipulation, and to ensure that workers who receive the same amounts from their employers are treated the same regardless of how their employers chose to spread out the payments, the legislature has established this procedure for calculating the number of weeks by which state benefits are delayed.

In the case of SUB pay, however, the total amount to be received is simply not known until the SUB payments have been exhausted. The Department cannot prospectively determine a worker's maximum entitlement under a SUB plan, because the worker's continued eligibility for SUB pay is determined on an ongoing week-by-week basis. Therefore, only after the worker has exhausted all payments from the SUB plan, the Department determines, retroactively, the period of time to which the private payments should apply. This, again, is calculated by dividing the total of the payments by the worker's last weekly salary. The resulting number of weeks is the period for which the worker's state benefits are delayed. The Department then holds that the person has been overpaid state benefits for that period. While this method may seem unduly cumbersome, SUB payments present a difficulty not presented by most other types of private payments. The Department must apply the statute in a consistent manner to a

multitude of different types of payments, and this is how the Department administers the statute.

The Department's determination of overpayment has no impact on the SUB payments the worker has already exhausted. There is nothing to indicate that the General Dynamics Plan has any provisions dealing with state overpayments. Any assertion about what General Dynamics might do after a state overpayment is pure conjecture.

More importantly, even if the General Dynamics Plan allowed the company to take adverse action against Engfer in case of a state overpayment, this would not provide a basis for preemption. Because if General Dynamics' later adverse actions were enough to preempt Minnesota law, then Minnesota would effectively be forced to let Engfer retain state benefits to which he was not entitled under state law. This would be a drastic expansion of ERISA's preemptive scope. ERISA preemption was intended to protect plans from conflicting state regulatory schemes; it was not intended to give plans the authority to force states to pay state benefits where none are due.

Any delay in Engfer's state benefits does not reduce the total amount he can receive from the state. When all is said and done, the net impact on Engfer is this: he gets SUB pay for the first 26 weeks that he is unemployed, and then, if he remains unemployed, he can receive state unemployment benefits for the next 26 weeks.⁷⁸ Engfer loses nothing from the state, because he can still collect the maximum state benefits to which he is entitled if he remains unemployed.

⁷⁸ The overpayment of state benefits previously received would be recouped through an offset of those future state benefits to which he would then be entitled.

b. The Minnesota provision does not bind plan administrators in a particular way.

Nothing in the Minnesota UI Law requires an employer to offer a SUB plan. Nor does Minnesota UI Law mandate that an employer structure its SUB plan a certain way. The state's law does not require employers to keep certain records, to make certain benefits available, to process claims in a certain way, or to comply with certain fiduciary responsibilities.⁷⁹ Employers may provide, refuse to provide, modify, or cancel any SUB plan without violating the Minnesota law. The challenged provision is only concerned with the administration of state unemployment benefits, not with that of SUB plans.

Hewlett-Packard Co. v. Diringer is instructive.⁸⁰ Diringer was found eligible for state workers' compensation benefits,⁸¹ but the decision of the administrative law judge did not take into account the value of employee benefits provided by the employer through ERISA plans.⁸² The issue for the federal district court was whether "the value of the ERISA-plan benefits [should be included] in the computation of her workers' compensation award."⁸³ Specifically, the employer challenged the Colorado statute which defined "wages" to include the "reasonable value of board, rent, housing, lodging, or any other similar advantages received from the employer."⁸⁴

The federal district court concluded that the law was not preempted. Because the workers' compensation act did not "bind plan administrators or prevent them from

⁷⁹ See *Fort Halifax*, 482 U.S. at 9.

⁸⁰ 42 F. Supp. 2d 1038 (D. Colo. 1999).

⁸¹ *Id.* at 1040.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1044 (citing Colo. Rev. Stat. § 8-47-101(1)-(2) (1986 & Supp. 1987)).

maintaining a uniform administrative package,” the court reasoned that the statute was not the type of law Congress intended to preempt.⁸⁵ A similar result is warranted here.

The majority opinion from the Court of Appeals assumes that the Minnesota provision “has the effect of coercing [SUB] plans to adopt a ‘certain scheme of substantive coverage’ in order to provide supplemental-unemployment benefits in Minnesota that will not be deducted as ‘wages,’ thereby diluting or eliminating the benefits intended by the plan.”⁸⁶ As explained above, the Minnesota UI law in no way dilutes or eliminates the payments a worker can receive under his SUB plan. The worker receives and keeps his SUB payments; the only impact on him is a delay of his state benefits.

c. The consequences of preemption are absurd.

If the Court finds that ERISA preempts the Minnesota provision, Minnesota’s ability to implement its unemployment compensation policy could be curtailed. Preemption could take away the state legislature’s power to decide when a person is eligible for state benefits, instead allowing the SUB plan to dictate when a person is eligible for state benefits.

⁸⁵ *Id.* at 1045; *see also Farrell v. Am. Heavy Lift Shipping Co.*, 805 So.2d 336, 344 (La. App. 2001) (concluding that because the state statute including vacation pay in a calculation of unemployment benefits, even when the pay was related to a union plan covered by ERISA, the statute “did not relate to or seek to regulate ERISA plans in anything more than the way in which laws of general application would affect citizens in their dealings with one another,” and was not preempted by ERISA); *Lawrence Paper Co. v. Gomez*, 897 P.2d 134, 935 (Kan. 1995) (concluding that a state statute including fringe benefits in a weekly wage calculation was not preempted by ERISA).

⁸⁶ *Engfer* at 241.

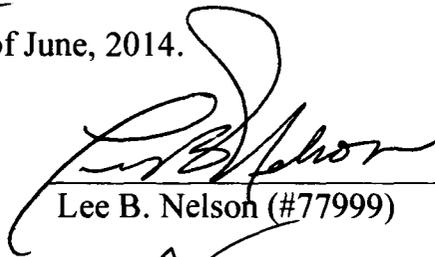
Consider, for example, if the Minnesota legislature decided to amend the state's unemployment compensation law to prohibit supplementation under SUB plans altogether. That would, under the Court of Appeals' reasoning, frustrate the purpose of an employer's SUB plan, and make uniform national administration of the plan difficult. The employer would have to come up with an alternative plan or payment structure for Minnesota than what it maintains for other states which allow supplementation. For these reasons, Minnesota's prohibition of supplementation would be preempted by ERISA, and Minnesota would be forced to permit supplementation. The unemployment compensation policy decision would, in effect, be made by employers offering SUB plans, not by the state legislature.

Preemption would have the same result if the Minnesota legislature decided to amend the statute to permit supplementation only up to 75 or 80 percent of the worker's weekly pay (as opposed to the 100 percent currently permitted), out of concern that 100 percent supplementation comes dangerously close to eliminating the incentive to work. Because, under the Court of Appeals' reasoning, the amendment would frustrate the employer's plan and make uniform national administration impossible, Minnesota's law would be preempted and Minnesota would be forced to permit whatever level of supplementation the employer in a particular case saw fit. Different companies in Minnesota could maintain different SUB plans, and Minnesota would have to permit each one of them.

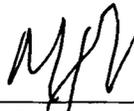
CONCLUSION

The Court of Appeals incorrectly concluded that ERISA governs the General Dynamics SUB plan and that ERISA preempts a portion of the Minnesota Unemployment Insurance Law dealing with SUB plans. The Department respectfully requests the Court to reverse the decision of the Court of Appeals.

Dated this 27th day of June, 2014.



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June 27, 2014

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RE: DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT
vs.
THOMAS V. ENGFER
and
GENERAL DYNAMICS ADVANCED INFOR. SYSTEMS
Court File No. A13-872

Dear Ms. O'Neill:

I am enclosing for filing the Appellant-Department's Brief and Appendix in this case.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Lee B. Nelson".

Lee B. Nelson (#77999)
Attorney for Appellant-Department

mlp

Enclosure

cc: HOWARD L. BOLTER, Esq., Respondent-Applicant's Attorney
PATRICK MARTIN, Respondent-Employer's Attorney