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Introduction

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INTRODUCTION

Theodore J. St. Antoine*

For the greater part of this century one characteristic preeminently distinguished American labor relations from the systems of other industrial nations, especially those of Western Europe. That characteristic was our reliance on voluntary collective bargaining instead of direct governmental regulation to set certain key substantive terms of employment in private industry. The difference was most striking in this country's reluctance to turn to government for protection of even such basic needs as physical safety and economic security. The most significant development in American labor and employment law over the past two decades was a dramatic shift in this laissez-faire policy. It began with the civil rights legislation of the mid-1960's, continued with the Occupational Safety and Health Act (OSHA) in 1970, and culminated with the Employee Retirement Income Security Act (ERISA) in 1974. Collective bargaining had not been up to the task in these vital areas, and the thirty-year decline in organized labor from over thirty-five percent to less than twenty percent of private, nonagricultural employment further accentuated the necessity for government intervention.

It is a commonplace that ERISA, an extraordinary hybrid of labor and tax law, is one of the most complex pieces of legislation Congress ever devised. Yet when I started a couple of years ago to try to teach something about it, both my students and I were dismayed and frustrated to discover a dearth of solid scholarship on the subject. The *William and Mary Law Review* had produced a fine Symposium¹ shortly after ERISA's passage, but beyond that there was a vast void. The editors of the *University of Michigan Journal of Law Reform* deserve commendations, and our gratitude, for recognizing that the formidableness of an enterprise should be a spur, not a deterrent, to undertaking it.

Had I been czar of this project, and at the same time irresistible in soliciting contributors, I would have covered the following

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1. *Symposium: The Employee Retirement Income Security Act of 1974—Labor Law Considerations*, 17 WM. & MARY L. REV. 205 (1975).

topics: ERISA as a component of national income and tax policy; enforcement strategy and tactics; federal preemption of state regulation; the fiduciary obligations of benefit plan administrators; and the impact of ERISA on collective bargaining. While I regret the absence of Articles on the last two subjects, I am overjoyed at the rest. We get *two* knowledgeable policy studies from intriguingly different perspectives, and provocative critiques and recommendations concerning both enforcement and preemption. And in place of the two omitted items in my more conventional list, the Symposium contains a pair of thoughtful, important Articles on subjects I would probably have overlooked: pension reform for women and the treatment of individual bankruptcies.

Women have a greater direct stake in retirement arrangements than men—they live longer—and it may not be coincidental that women figure so prominently among the authors here. Phyllis Borzi is especially concerned about the long-term maintenance of retirement benefits at adequate levels for all workers. She is uneasy about the increasing use of defined contribution rather than defined benefit plans, integration with Social Security (which may mean less private money for low-wage employees), and insufficient coverage of workers for various reasons, including deficient “selling” of pension plans. Alicia Munnell opens by describing the enactment of ERISA “in response to documented failures of the private pension system.”² She has a particular interest in ERISA’s relation to tax and employment policy, including the substantial loss of revenue resulting from the concessions granted pension plans, and the disincentives created for the hiring of older workers. She is satisfied, however, that ERISA’s major goal of ensuring the receipt of benefits is fully consistent with the objectives of federal tax policy.

Beverly Klimkowsky and Ian Lanoff make a convincing case for a position that may be assuming consensus proportions among ERISA experts, namely, that effective enforcement of ERISA requires a single independent agency to administer it. In dealing with federal preemption, Leon Irish and Harrison Cohen argue that the extremely broad language of section 514(a) of the Act “has made it impossible to develop a sound or internally consistent jurisprudence of ERISA preemption.”³ They call for a

2. Munnell, *ERISA—The First Decade: Was the Legislation Consistent with Other National Goals?*, 19 U. MICH. J.L. REF. 51, 51 (1985).

3. Irish & Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109, 163 (1985).

clearer enunciation of "guiding policy." Although their point is well taken, the blunt hammer of section 514(a) may have served some worthy purposes well. Without it, for example, budding group legal services plans might have been nibbled to death by a horde of hostile state regulators.

Finally, Anne Moss and John Newell provide perceptive analyses of two subjects I must confess I would have neglected. Moss focuses on the ways women's financial problems have been compounded by "[t]he inequities of our private and governmental pension systems."⁴ For instance, it was not until the Retirement Equity Act (REA) of 1984 that Congress paid special heed to the fact that many women work while young and then temporarily leave the labor force during child-rearing years. One response was to mandate pension plan participation and vesting rights at earlier ages. As for John Newell's erudite dissection of the rights and liabilities of individual bankrupts in regard to ERISA-qualified retirement benefits, I simply throw up my hands in awe and inadequacy. If Newell has J.J. White's blessing, I know what he has to say is sound and supportable.

The editors have put together an imposing and instructive package. I am much in their debt, and so shall be many others.

4. Moss, *Women's Pension Reform: Congress Inches Toward Equity*, 19 U. MICH. J.L. REF. 165, 165 (1985):

