



Consumer Fraud Act “Strike Replacement” Section is Preempted by Federal Labor Law

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For Discussion Only

The New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.* provides legal requirements for temporary help service firms doing business in New Jersey. Regulations promulgated by the N.J. Department of Consumer Affairs provide a comprehensive regulatory regime.

Under relevant regulations, "Temporary help service firm" means any person who operates a business which consists of employing individuals directly or indirectly for the purpose of assigning the employed individuals to assist the firm's customers in the handling of the customers' temporary, excess or special workloads, and who, in addition to the payment of wages or salaries to the employed individuals, pays federal social security taxes and State and federal unemployment insurance; carries worker's compensation insurance as required by State law; and sustains responsibility for the actions of the employed individuals while they render services to the firm's customers.

The state law also provides penalties for certain activities by temporary help service firms, including when such firms:

Knowingly send individuals it employs to, or knowingly continue to render services to, any plant or office where a strike or lockout is in progress for the purpose of replacing individuals who are striking or who are locked out. Any person conducting a temporary help service firm which knowingly sends its employed individuals to, or knowingly continues to render services to, a plant or office where a strike or lockout is in progress for the purpose of replacing those individuals who are striking or who are locked out or, directly or indirectly counsels, aids or abets that action shall be liable to a penalty of \$1,000 upon each occurrence. The penalty shall be sued for, and received by and in the name of the Attorney General and shall be collected and enforced by summary proceedings pursuant to "the penalty enforcement law"

Read literally, temporary help service firms would be liable for rendering services during a strike or lockout but so to would employers that retain the services of the firm and lawyers and labor

consultants that counsel retention of such services. Thus, the statute directly penalizes an employer's decision to retain the services of a temporary help service firm during a strike or lockout.

The right to strike is codified under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169. Its purpose is to "create a national, uniform body of labor law and policy, to protect the stability of the collective bargaining process, and to maintain peaceful industrial relations." *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 861 (7th Cir.), cert. denied, 525 U.S. 949 (1998). The NLRA provides an integrated scheme of rights, protections, and prohibitions governing employee, employer, and union conduct during organizing campaigns, representation elections, and collective bargaining. The NLRA also creates the National Labor Relations Board (Board) to interpret and administer the Act and to resolve labor disputes. See 29 U.S.C. §§ 153-154, 160; *Garner v. Teamsters, Chauffeurs & Helpers Local Union 776*, 346 U.S. 485, 490, 74 S. Ct. 161, 98 L. Ed. 228 (1953).

Specific provisions in the NLRA protect an employee's right to join or not join a union and provide mechanisms to resolve questions concerning union representation. See *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79, 84 S. Ct. 894, 11 L. Ed. 2d 849 (1964). Section 7 of the NLRA provides the core rights of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities" as well as the right "to refrain from any or all such activities[.]" 29 U.S.C. § 157. Section 8 defines and prohibits union or employer "unfair labor practices," which would include employer actions that infringe on an employee's Section 7 rights. 29 U.S.C. § 158. Section 10 authorizes the Board to adjudicate claims of unfair labor practices. See 29 U.S.C. § 160.

The NLRA contains no express preemption provision, but the U.S. Supreme Court has held preemption necessary to implement federal labor policy where Congress intended particular conduct to be unregulated and reserved to "a zone protected and reserved for market freedom" *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 140; *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U. S. 218, 227

It is well settled that under the National Labor Relations Act (NLRA), an employer has the right to remain open and operational during a work stoppage. In order to accomplish its operational goals, such an employer may hire replacement workers. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). If the strike is an economic strike (a strike attempting to persuade an employer to accept certain terms and conditions of employment, including wage and benefit demands), an employer has the option of using temporary and/or "permanent" replacements. But, during an unfair labor practice strike (a strike in response to an employer's unfair labor practices), the employer may only use temporary replacements to continue operations during the strike, and the temporary replacements will be displaced by returning strikers. In either situation, though, the right to hire replacement workers is unassailable.

States may not regulate "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Gould, Inc.*, 475 U.S. at 286 (citing *San Diego Bldg. Trades Coun. v. Garmon*, 359 U.S. 236, 244, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)). In *Garmon*, the Court explained that

Congress intended to preempt state regulation that potentially impaired the jurisdiction of the National Labor Relations Board as the federal forum for the resolution of labor disputes. State law cannot regulate the same employer or employee conduct that Congress empowered the Board to regulate under uniform national law. *See Garmon*, 359 U.S. at 242-44; *see also Gould, Inc.*, 475 U.S. at 286. When the conduct to be regulated is “plainly within the central aim of federal regulation,” then state regulation presents a “danger of conflict between power asserted by Congress and requirements imposed by state law” and “potential frustration of national purposes.” *Garmon*, 359 U.S. at 244.

Garmon preemption, however, is broader than simply preempting matters plainly within the aim of the NLRA. *Garmon* preemption also applies even when it is unclear that the conduct to be regulated is subject to the Board’s power under the NLRA. “When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.” *Id.* at 245. The preemption of state law that is “arguably” subject to the NLRA protects the Congressional policy that allows the Board to decide whether a subject is to be regulated under the NLRA. *Id.* at 245. The Board is charged with using its procedures and “its specialized knowledge and cumulative experience” to apply the NLRA and, in many circumstances, to define the scope of what is addressed by the NLRA. *Id.* at 242

Thus, the first step in evaluating preemption under *Garmon* is to examine whether the employer conduct to be regulated by state law is “arguably subject” to being addressed by the Board. While the state may regulate consumer fraud and temporary help service firms it cannot interfere with the employer’s decision to retain the services of a temporary service firm in order to exercise its legally recognized property rights.

The Supreme Court described a second basis for preemption in *International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976), now known as *Machinists* preemption. Under *Machinists*, “the crucial inquiry [is] whether Congress intended that the conduct involved be unregulated” and whether the conduct is “to be controlled by the free play of economic forces.” *Id.* at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971)).

Machinists arose when an employer and union reached an impasse after a collective bargaining agreement expired. The Court recognized that both employers and unions have “economic weapons,” and state law regulating the use of economic force by the union or employer could frustrate the processes built into the Act for resolving such disputes. *Id.* at 147-48. The employer obtained a state court order, pursuant to state law, requiring the employees not to use their “economic weapon” of refusing to work overtime. *Id.* at 148-49. The Court held that the state law affected the substantive aspects of bargaining between the union and employer, which Congress implicitly meant to be unregulated. *Id.* at 149. In reaching this conclusion, the Court held that by adopting the NLRA, Congress intended that certain employer and employee actions were not to be regulated by the States.