ERISA: The Law of Unintended Consequences
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One objective frequently attributed to the federal Employee Retirement Income Security Act of 1974 ("ERISA") is to promote the growth of private benefit plans by preempting the patchwork of state laws that would otherwise burden plan administration. Given this objective, it may seem ironic that ERISA now serves increasingly to limit rather than expand employee benefits, as employers invoke its preemption feature to challenge state and local laws intended to mandate minimum health care benefit packages. ERISA seeks to encourage multi-jurisdictional employers to offer benefits by removing regulatory obstacles, without exception for those existing in the form of state and local laws that ostensibly share ERISA’s purpose of expanding the reach of employer-sponsored plans.

The preemption tool proved its effectiveness against state benefit mandates in 2006 when Maryland sought to force Wal-Mart to pay what state legislators deemed to be its “fair share” of its employees’ health care costs. Taking note of employment practices that resulted in total compensation sufficiently low to permit Wal-Mart employees and their families to qualify for Medicaid and State Children’s Health Insurance Program programs, Maryland enacted the Fair Share Health Care Fund Act. It was drafted in such a way as to apply only to Wal-Mart and no other employer then conducting business in the state. The Fair Share Act required for-profit employers of a certain size that did not spend at least 8% of payroll on health insurance costs (read Wal-Mart) to pay the difference into a Medicaid support fund. Wal-Mart took the state to federal district court in Retail Industry Leaders’ Association v. Fielder, 435 F.Supp. 2d 481 (D. Md. 2006), aff’d 475 F.3d 180 (4th Cir. 2007), claiming that the Fair Share Act was preempted by ERISA, specifically by Section 514 thereof, which provided for preemption of any state laws that relate to any employee benefit plan, with certain enumerated exceptions.

Wal-Mart prevailed in district court, and thereafter on appeal to the Fourth Circuit, on the grounds that the Act would have effectively required Wal-Mart to establish a benefit plan with a minimum benefit level set by the state, namely, 8% of payroll. The Act thus related to a benefit plan sufficiently to trigger preemption. Maryland countered that the Act allowed Wal-Mart the alternative of paying into a public fund, but the district court dismissed this as a Hobson’s choice, observing that no reasonable employer would pay into a fund rather than spend the same amount on employee benefits and reap the goodwill.

In 2007, Suffolk County, New York, lost a preemption challenge to a “fair share” law similar to Maryland’s. Retail Industry Leaders’ Association v. Suffolk County, 497 F.Supp.2d 403 (E.D.N.Y. 2007). Suffolk County’s law was notably different from Maryland’s in that Suffolk County linked the charge to employers directly to the cost the County would have incurred for uninsured employees, whereas Maryland specified a percentage of payroll. Under the Suffolk County program, the County would annually estimate the public cost per uninsured employee per hour and require employers to pay that amount into either a public fund or an employee health benefit package. Certain other options were available to employers under the law, but like the Fielder courts, the Eastern District of New York determined them to be illusory, with the result that Suffolk County’s “fair share” law also related to employee benefits sufficiently to trigger ERISA preemption.

Can an employer mandate be structured so that it will not relate to employee benefit plans within the meaning of ERISA? The phrase “relate to” has been interpreted broadly to take in any state law having a “reference to” or a “connection with” an employer plan. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983). A state law references a plan within the meaning of ERISA where the law immediately and exclusively acts upon the plan, as in Mackey v. Lanier Collection Agency & Services, Inc., 486 U.S. 825 (1988), where a state law prohibited garnishment of plan funds. The effect of the state law on employee benefit plans there was immediate (because not indirect – the law acted directly upon ERISA plans), and exclusive (because it affected only employee benefit plans). Courts have also found sufficient reference to plans where they were essential to the operation of the state law, even without immediacy and exclusivity. An example is California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316, 325 (1997), where a state law created a wrongful discharge cause of action for an employer intending to avoid

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its obligations under an employee benefit plan.

On the other hand, the scope of the phrase “relate to” has limits, as the Supreme Court determined in **New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.**, 514 U.S. 645 (1995). There a state legislature had sought to impose a surcharge on hospital bills for patients covered by commercial insurers other than Blue Cross or Blue Shield, thereby creating an economic incentive for anyone, including ERISA plan administrators, to enroll with the Blues. The law did not relate exclusively to ERISA plans, but the effect of the law was certainly felt by those enrolled in ERISA plans, among others. The Court held that this connection between the law and employee benefit plans was not sufficient to trigger ERISA, since otherwise all that would be needed for preemption would be for a plaintiff to show an economic effect, however tenuous, on a plan. The Court specifically asserted that cost uniformity was almost certainly not an object of Congress in establishing ERISA preemption. Uniformity of plan administration, structure and benefits from state to state, on the other hand, certainly is an object of ERISA; but if a state law of general applicability regulating health has an incidental effect on an ERISA plan, and does not bind plan administrators to a particular choice, preemption is not justified. At 659.

The Ninth Circuit seems convinced that the **Travelers** limitation can rescue an employer mandate from ERISA preemption. In 2006 San Francisco implemented its Health Access Program (known as **Healthy San Francisco**), which contains an “Employer Spending Requirement.” Under Healthy San Francisco, employers must spend amounts varying between $1.17 and $1.76 per employee per hour on health care, either through a benefit plan or into a public fund. An employer association’s ERISA challenge succeeded in district court, but in January of 2008 the Ninth Circuit granted a temporary stay of the district court’s order to permit the city to implement the mandate. 512 F.3d 1112 (C.A.9 2008). Unlike the **Fielder** and **Suffolk County** courts, the Ninth Circuit did not deem the choice of contributing the same amount to either an ERISA plan or a public fund (thereby forgoing employee goodwill) to be a Hobson’s choice. Rather, the Ninth Circuit took the choice to be justified under **Traveler’s** rationale that laws having the incidental and indirect effect of motivating employers to offer ERISA benefits do not effectively require employers to establish ERISA plans or dictate their terms. The Ninth Circuit accordingly held that San Francisco was sufficiently likely to prevail on the merits to justify the stay.

For better or worse, this nation long ago adopted an employer-based system of providing health care benefits. This has engendered not only the kind of inequitable burden sharing among employers that drove Maryland and Suffolk County to pursue Wal-Mart to pay its “fair share”, but also a huge national insurance coverage gap. There are just too many population subgroups not included among insured employees, Medicare/ Medicaid/SCHIP eligibles, and those sufficiently affluent to be privately insured. The universe of solutions to this problem would include exchanging the employer-based coverage system for one at either the state or federal level based on general revenues. Such a solution has proved to be beyond the reach of our political will, however, which leaves us in the space ERISA inhabits.

Confining ourselves to solutions to the ERISA problem, then, we can hope for a reconciliation of the divergent positions of the Fourth and Ninth Circuits as to employer “pay or play” mandates. Is the choice between providing minimum health care benefits and paying into a public fund a Hobson’s choice or a real one? If it can be a real one, “pay or play” legislation may be structured so as to survive preemption.

The ERISA problem could also be resolved by legislative or administrative action. Congress could finally respond to calls to make ERISA work within the health care environment. A less intrusive way of proceeding, however, may be for Congress to authorize the Department of Labor to issue ERISA waivers for states and localities wishing to establish employer coverage minimums. A waiver program would be consistent with ERISA’s presumption against preemption of state or local laws regulating matters that fall within traditional state police powers. **Dillingham**, at 325; ERISA §514(a). Waivers could be granted for reasonably delimited programs. Based on findings of state legislatures to the effect that the current system enables certain employers effectively to shift the cost of employee health care to public programs (475 F. 3d 180, 184), it is reasonable to expect that the Department of Labor would look favorably on waiver applications from jurisdictions establishing and quantifying such costs, as Suffolk County attempted to do.

True, a waiver program would compromise ERISA’s objective of establishing uniform regulatory conditions for plan administration across all jurisdictional lines, but compromise seems reasonable where employers could otherwise shift a burden onto a state or locality. It is one thing for an employer to be discouraged from offering a benefit by multijurisdictional requirements, and another for an employer to be able to pass costs on to the jurisdiction in question. It would be hard to argue that this was ever ERISA’s intent.