

What Can We Learn About Federal ERISA Law from Maryland's Court Decision?

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Presentation Overview

- Background on ERISA preemption provisions
- Implications for state health care access initiatives:
 - MD and MA laws
 - Employer ‘pay or play’ laws
 - Other access initiatives and health insurance regulation
 - Public program premium assistance programs
- ERISA preemption materials available on:
 - www.NASHP.org

ERISA

- Federal Employee Retirement Income Security Act of 1974
- Regulates private sector pension programs and (to a limited extent) employee welfare benefit programs, including health coverage
- Applies to all plans offered by private sector (not public) employers or unions (except churches) *whether offered through insurance or self-insured*
 - *Both types of plans are “ERISA plans”*

ERISA Preemption

- Preempts state laws that “relate to” employee benefit plans (including health plans), even if they don’t conflict with federal law
- Exception to preemption:
 - State regulation of the business of insurance (“savings clause”)
 - States cannot deem private employer or union plans to be insurers, therefore:
 - States cannot regulate ERISA plans directly, but by regulating health insurers, states can affect insured ERISA plans

ERISA Preemption

- Preemption applies despite limited federal regulation of ERISA health plans (in comparison with state health insurance standards)
- Object of preemption was to encourage employers to sponsor plans and not be subject to multiple, varying state laws
- Courts interpret meaning of preemption clause

Court Interpretations of ERISA's Preemption Clause

Does state law “relate to” private union- or employer-sponsored health plan?

- Does it refer to such plans
 - Explicitly or by requiring reference to a plan to implement?
- Does it have a connection with such plans by:
 - Regulating areas ERISA addresses?
 - Regulating plan benefits, structure, or administration?
 - Imposing substantial costs on plans?

ERISA Preemption

- Increasingly broad court interpretation of preemption from 1974 to 1994
 - Narrowed in 1995 *Travelers* case (*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance* (S. Ct. 1995))
 - Upheld NY hospital rate-setting law that could raise ERISA plan costs to some extent
- **Basic tests for preemption remain:**
 - State law cannot refer to or have a connection with ERISA plans

ERISA “Savings Clause”

Important exception to ERISA preemption:

- State laws regulating *insurance* (as well as banking and securities) can have access implications
- U.S. Supreme Court has recently simplified the test for what state laws constitute insurance regulation
 - Laws must be aimed at insurers and insurance practices (not just any insurer activities)
 - Laws must “substantially affect risk pooling arrangements” between insurer and insured

ERISA Implications for State Employer-Based Access Initiatives

Mandates preempted:

- Requiring employers to cover workers or directly regulating contents or financial arrangements of employer- or union-sponsored plans
- Standards applying only if an employer voluntarily offers coverage
- Requiring health insurance to cover auto accident medical claims
- Coordination of health insurance, disability coverage, and workers' compensation

Maryland “Fair Share Law” & RILA case

- 2006 law requires for-profit employers >10,000 workers to pay into state Medicaid fund difference between what they spend on employee health care & 8% of payroll
- In *RILA v. Fielder*, 4th Circuit Court of Appeals held ERISA preempts this law because it is ‘connected with’ ERISA plans

RILA v. Fielder

1. Law is a mandate not a tax
 - Targeted at plan of a particular employer and Wal-Mart indicated it would expand coverage rather than pay fee
 - Sponsors said it was intended as a mandate
1. Court not persuaded that affected firm could satisfy law by health care spending other than through establishing or expanding an ERISA plan
2. Law interferes with multi-state plans' uniform national administration
 - Conflicts with other state laws
 - Requires employer to segregate its expenditures in each state

Massachusetts 2006 Health Care Access Law

- Requires all residents to obtain coverage (if affordable) or face income tax penalty
- Requires employers of >10 workers to:
 - offer section 125 plans (for employees to buy coverage w/ pre-tax dollars)
 - Or be liable for up to 100% of uncompensated care costs of employees & dependents with high uncompensated care costs
 - Pay up to \$295/worker/yr (to fund uncompensated care) if at least $\frac{1}{4}$ of employees are not enrolled in plan or firm does not pay at least $\frac{1}{3}$ of premium

Massachusetts 2006 Health Care Access Law: ERISA Issues

- Individual mandate should not raise ERISA problems
- DOL policy: Section 125 plans are not ERISA plans
 - so arguably neither 125 plan mandate nor “Free Rider” penalty has ‘connection with’ ERISA plans
- “Fair Share” contribution arguably has an impermissible ‘connection with’ ERISA plans because exemption from fee depends on employer contribution levels
 - Low cost may not encourage employers to litigate
 - Business community broadly supported the law

ERISA Implications for Other State Employer-Based Access Initiatives

Broad-based “Pay or Play” Initiatives

- State creates a public program, financed partially with taxes on employers (not plans)
- Employers offering employee health coverage receive a credit for coverage costs
- Likely to withstand an ERISA challenge if:
 - Program is broad-based and tax-financed
 - State is neutral regarding whether employers offer coverage or pay tax (not a disguised mandate)
 - State does not set standards to qualify for tax credit or otherwise refer to ERISA plans

ERISA Implications for Other State Employer-Based Access Initiatives

- Health coverage tax credits
 - Despite theoretical preemption issues, unlikely to be challenged
 - Arguably general tax powers are traditional exercise of state authority sanctioned by Supreme Court in 1995 *Travelers* case
- Requiring health coverage as a condition of participating in public works contracts
 - Some courts have held ERISA does not preempt public works contract employee benefits mandates under certain circumstances
- Prevailing wage laws
 - Some courts have held ERISA does not preempt state and local wage laws requiring employers to pay a “total package” of wages and/or health benefits

ERISA Implications for Other State Employer-Based Access Initiatives

Insurance regulation

- States can regulate underwriting and sales practices (consistent with HIPAA):
 - Guaranteed issue and renewability
 - Coverage of pre-existing conditions
- States can mandate coverage benefits
 - Not preempted by ERISA, but may encourage employers to self-insure, which recent research suggests is due to variation in state insurance laws, not any specific standard

ERISA Implications for State Premium Assistance Programs

Many states would like to buy into employer health coverage for Medicaid and SCHIP beneficiaries (“premium-assistance” programs)

- States cannot require employers to participate
- Difficult to obtain information about employer coverage (benefits, premium sharing, employee qualifications, work status, waiting periods) because states cannot compel employers to report this information or inform lower-income employees about the opportunity to enroll in public programs

ERISA Implications for State Premium Assistance Programs

HIPAA amendments to ERISA permit states to require insurers to allow people eligible for Medicaid or SCHIP to enroll in the employer plan during “special enrollment periods”

- Authorized by HIPAA section 731 (in ERISA @ 29 U.S.C. 1191(b)(2)(F))
- These insurance rules do not apply to self-insured plans (primarily offered by large employers)

ERISA Implications for Raising Revenues for Access Initiatives

- Taxes directly imposed on employer- or union-sponsored plans would be preempted
- Taxing insurers, reinsurers and health care providers should not be preempted
- Taxing employers with a credit for their health care spending (“pay or play”) should not be preempted
- Payroll taxes to support universal public programs raise preemption issues
 - If they eliminate need for employer plans and reduce multi-state employers’ options to provide nationally uniform coverage
 - States can argue that ERISA should not preempt purely public programs

ERISA is not logical...

