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CLIENT ALERT

The Maryland “Wal-Mart Bill” – Is it Preempted?

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A retail industry trade association group filed a complaint in federal district court in Maryland on February 7, seeking to invalidate the Maryland Fair Share Health Care Fund Act. *Retail Indus. Leaders Ass'n v. Fielder*, (D. Md., No. 1:06 -cv-00316-JFM, *filed* 2/7/06). Widely known as the “Wal-Mart bill,” the Act requires private employers with more than 10,000 employees working in the State to make expenditures on health benefits for their employees in an amount equal to 8 percent of the total compensation paid to Maryland employees. If the employer does not meet that standard, it is required to pay the shortfall as a penalty to the State government. The Act appears to apply only to Wal-Mart.

Supporters of the Act claim that certain large employers are failing to provide adequate health care coverage for many of their workers and their families. As a result, they say, these companies are shifting the responsibility onto state and local taxpayers, because health care coverage has to be provided under programs like Medicaid. Evidence presented to the Maryland legislature, taken from surveys taken in Georgia and North Carolina , suggest that a substantial percentage of Wal-Mart employees qualify for Medicaid. The fundamental rationale of the Act is that the 8% minimum contribution requirement will save taxpayer money by making it less likely that employees of covered employer would end up on Medicaid.

The Act was strongly supported by organized labor, and is viewed as one of the cornerstones of the labor movement's national campaign against Wal-Mart. Certain unionized competitors of Wal-Mart are on record in supporting the Act. Similar “fair share” legislation is pending in several other states.

Allegations in the Complaint

The complaint alleges that the Act is preempted by the Employee Retirement Income Security Act (ERISA). ERISA's preemption provision supercede state and local laws that “relate to” employee benefit plans. 29 U.S.C. § 1144(a). The complaint asserts that the purpose of ERISA is to "establish a uniform national framework for sponsoring, administering, protecting, and regulating employee benefit plans, including pension plans and health and welfare plans." Plaintiffs allege that the Act “conflicts with” the ERISA framework by, *inter alia*, requiring covered employers either to sponsor health insurance programs or to change the administration of existing programs. In addition, the complaint alleges that the Act disrupts the uniform national administration of employee benefits plans, "since it imposes on covered employers different health care obligations toward employees in Maryland than owed to employees elsewhere in the country." The plaintiffs also claim that the Act violates the Equal Protection Clause because it treats a certain class of employers in a different and arbitrary manner. The complaint also alleges a violation of a Maryland constitutional provision against “special laws” enforced only against one entity. The complaint asks for a permanent injunction against enforcement of the Act, which is effective January 1, 2007 .

The Preemption Arguments

As one might predict, preliminary assessments of this lawsuit have been split along ideological lines. Opponents assert the Act is effectively a mandated benefits law of the type previously held preempted by ERISA. Proponents of the Act believe that the unique structure of the statute, characterized by some as a "play or pay" requirement, makes ERISA preemption unlikely.

The complaint suggests that plaintiffs will try to characterize the Act as a mandated benefit law. In *Metropolitan Life Insurance v. Massachusetts,* 471 U.S. 724 (1985), the Supreme Court ruled that state mandated benefits laws "relate to" ERISA plans within the meaning of ERISA's preemption provision. Courts have frequently found mandated benefits laws preempted. *See, e.g. Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85 (1983)(New York state disability benefits law preempted to the extent it required employers to provide pregnancy disability benefits in excess of the requirements of federal law); *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992) (District of Columbia law preempted because it required employees on workers' compensation to get the same health benefits as active employees); *General Electric Co. v. New York State Dept of Labor,* 891 F.2d 25 (2d Cir. 1989) (New York prevailing wage statute preempted by obligating employers to provide certain level and type of fringe benefits) *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd* , 454 U.S. 801 (1981) (Hawaii law mandating employee health coverage held preempted).

Proponents of the Act are correct in asserting that the Act is literally not a mandated benefits statute, in the traditional sense of that term. Supporters claim that the Act, carefully drafted to avoid ERISA preemption, regulates employers and not ERISA benefit plans.

Supporters also stress that a covered employer can comply with the statute in a variety of ways that would require neither establishment of an ERISA plan, nor substantive changes to any existing plans. As an example, an employer could comply with the Act by making direct payments to covered employees through a cash bonus. Other commentators suggest that an employer could comply by subsidizing health insurance benefits in ways not involving ERISA plans, through the introduction of Health Savings Accounts, or by funding an on-site clinic.

Resolution of these arguments will doubtless spark yet another debate over the Supreme Court's ERISA preemption jurisprudence. Some of the Court's more recent preemption decisions, *e.g., New York State Conference of Blue Cross & Blue Shield Plans et al. v. Travelers Insurance Co., et a.,* 514 U.S. 645 (1995) and *California Division of Labor Standards Enforcement et al v. Dillingham Construction,* 519 U.S. 316 (1997), are widely viewed as reflecting an intent by the Court to restrict the scope of ERISA Section 514(a). In both opinions the Court expressed frustration with its prior attempts at interpreting the "relates to" language in ERISA Section 514(a). After all, as Justice Scalia observed in *Dillingham,* "everything is related to everything else." 519 U.S. at 335.

The trade association's lawsuit will challenge the courts to reconcile decisions like *Travelers* and *Dillingham,* which are distinguishable from the Act, with other opinions that have taken a more expansive view of ERISA Section 514(a). In this context, the interpretation of *Travelers* is likely to be critical. Supporters of the Act will likely argue that the Act is a law of general applicability addressing a matter of traditional local concern, with only an "indirect economic influence" on covered employers within the meaning of *Travelers.* Advocates for that segment of the business community challenging the Act will respond by arguing that the Act presents a covered employer with the Hobson's choice suggested at the conclusion of the Court's opinion in *Travelers.* In any event, the issues presented by the Act, and the importance of the Act to organized labor's strategy to reverse the decline of union membership in the private sector, insure that this case will be followed closely.

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