ERISA Implications for State Health Care Access Initiatives

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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 employers or unions (except churches) *whether offered through insurance or self-insured*
  - *Both types of plans are "ERISA plans"*

2

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”)
- But 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

3

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

4

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

5

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

6

ERISA Preemption

- Courts have held that states cannot:
  - Require employers to offer health coverage (*Standard Oil v. Agsalud,* invalidating Hawaii employer mandate (9th Cir.1980))
    - NB: Hawaii's 1983 congressional exemption to its employer mandate
  - Dictate the terms of an ERISA health plan's coverage, employer's premium share, etc. (*Hewlett-Packard v. Barnes, holding* California HMO law inapplicable to self-insured employer plans (9th Cir. 1978)
  - Tax employer-sponsored health plans (*Bricklayers Local No. 1 v. Louisiana Health Ins. Assoc*., holding that state cannot assess self-insured employer plans to fund high risk pool (E.D. La. 1991)

7

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 (*Kentucky Health Plan Assoc. v. Miller (S. Ct. 2003))*
    - 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

8

ERISA Implications for State Employer-Based Access Initiatives

- Mandates that would be preempted:
  - Requiring employers to cover workers or directly regulating contents or financial arrangements of employer- or union-sponsored plans (Standard Oil and Hewlett-Packard)
  - Standards applying only if an employer voluntarily offers coverage (*District of Columbia v. Greater Washington Bd. of Trade (*S. Ct. 1992))
  - Requiring health insurance to cover auto accident medical claims
  - Coordination of health insurance, disability coverage, and workers' compensation

9

ERISA Implications for State Employer-Based Access Initiatives

- Health coverage tax credits
  - As a voluntary incentive, should not be preempted
  - 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 "total package" prevailing wage laws

10

ERISA Implications for 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:
    - Broad-based tax-financed program
    - 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

11

Maryland "Fair Share Law" & RILA case

- 2006 law required 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

12

RILA v. Fielder 4th Circuit Decision

- 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
  - Bill sponsors said it was intended as a mandate
- Court not persuaded that affected firm could satisfy law by health spending other than through establishing or expanding an ERISA plan
- Law interferes with multi-stat plans' uniform national administration
  - Conflicts with other state laws and proposals
  - Requires employer to segregate its expenditures in each state

13

Suffolk County (NY) Court Decision
(RILA v. Suffolk County)

- County required large grocery retailers to make health care expenditures for workers in an amount that equals the per person cost of the county to treat an uninsured worker
  - Employer spending defined similar to MD law
  - Employer spending less than required amount would pay the shortfall to the county
  - Although not directed only at Wal-Mart, it would be affected by law and was one target
- Federal court held ERISA preempts this law
  - Analysis similar to that of 4th Circuit in MD case

14

San Francisco Program

- SF "Health Access Program" = public health (hospital and clinic) delivery system for uninsured city residents
  - Enrollees pay sliding scale premiums
  - Employers pay a per-hour-worked assessment:
    - $1.17/hr: private employers with 20-99 workers or nonprofits with 50 or more workers
    - $1.76/hr: private employers with 100 or more workers
    - Spending defined broadly (reimbursement for employee health spending, HSA contributions, insurance, direct care costs)

15

San Francisco Program

- In late 2007 federal district court held ERISA preempts the law
  - Held ordinance refers to and is connected with ERISA plans
  - Applied 4th Circuit reasoning to hold that the ordinance requires a "mandatory level of coverage" and therefore regulates employer plan benefits
- Order stayed by 9th Circuit Court of Appeals pending appeal decision (January 2008)
  - Held city is likely to succeed on appeal because law is not benefits mandate but only a payment requirement
    - allows employer to choose to pay fee or create/amend an ERISA plan
  - Appeal to be heard in spring 2008 – decision later this year

16

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 $)
    - 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 ¼ of employees are not enrolled in plan or firm does not pay at least 1/3 of premium

17

Massachusetts 2006 Health Care Access Law: ERISA Issues

- Even individual mandate could raise ERISA problems
  - Arguably, requiring individuals to have minimum coverage is an attempt to influence employer-sponsored plan design
- 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

18

ERISA Implications for Raising Revenues for Access Initiatives

- Taxes directly imposed on employer- or union-sponsored plans
  - Would be preempted if applied directly to self-insured ERISA plans
  - Taxing insurers or health care providers should not be preempted, even if this imposes some costs on ERISA plans (3 post-Travelers Ct of Appeals decisions)
- Payroll taxes to support public programs (e.g., single payer) ought to be O.K. though they may be challenged as requiring employers that want to provide uniform multi-state plans to pay tax in violation of ERISA
- Employer pay or play requirements (not conditioned on coverage meeting standards)

19