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January 11, 2006

Mr. Ronald Winholt
Vice President of Government Affairs
Maryland Chamber of Commerce
60 West Street, Suite 100
Annapolis, Maryland 21401

Re: "Fair Share Health Care Fund Act" Proposal - AG's Opinion

Dear Mr. Winholt:

You asked us to review the Attorney General's letter to Speaker Busch dated January 9, 2006 concerning the issue of whether the Employee Retirement Income Security Act of 1974 preempts the proposed "Fair Share Health Care Fund Act" as reflected in Senate Bill 790 and House Bill 1284 (the "Proposal").

Like the letter to the SEIU from Phyllis Borzi that you asked us to review previously, the AG's letter makes certain policy arguments in favor of the Proposal. However, unlike Ms. Borzi's letter, the AG's letter, in essence, posits the following as its understanding of the broad preemption rule found at Section 514 of ERISA:

Although a State law directly requiring an employer to maintain an employee health plan costing at least 8% of its payroll would be preempted by ERISA, a State law like the Proposal indirectly requiring an employer (by the imposition of the assessment) to maintain an employee health plan costing at least 8% of its payroll would not be preempted by ERISA.

Obviously, such a strained interpretation of ERISA's broad preemption provision would leave it meaningless, and would subject employers to exactly the kind of tangle of State regulation that the Congress sought to avoid by enacting that provision. For example, Maryland could impose an 8% minus actual costs charge on employers with operations in Maryland, California could impose a 10% minus actual costs charge on employers with operations in California, Vermont could impose some other more complex formulaic charge on employers with operations in Vermont, and so on, leaving multi-State employers continually scurrying to understand and meet State employee benefit plan rules in addition to ERISA's comprehensive scheme of federal employee benefit regulation that was intended to supplant State law.

The AG's letter suggests that State laws like the Proposal which are targeted directly at, which relate directly to, and that are designed to alter employee benefit plans governed by ERISA are not preempted by ERISA because there are ways that employers can avoid the State laws other than modifying their ERISA-governed plans or paying a State assessment determined by reference to

those plans (e.g., ceasing or reducing operations in the State, reducing the pay of employees to force up the percentage of payroll it spends on its plans to the State minimum, and the like). This argument is neither supported by the statute or case law, nor sensible. That is, no where in ERISA's preemption provision or the cases interpreting it is there a concept that states that a State law the purpose of which is to cause an employer to alter its ERISA plan design or pay a fine, civil penalty or assessment is saved from ERISA preemption because the employer can simply leave the State (or take other action) in order to avoid it.

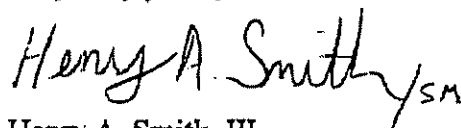
(Note that the AG's letter misunderstands the concept of a "health plan" as defined under ERISA. The letter suggests that employers can provide their employees with reimbursements for medical costs outside the context of their ERISA-governed health benefit plan. In fact, ERISA's definition of "health plan" is so broad that it picks-up virtually all health-related compensation elements provided by employers to employees (with exceptions not relevant here), whether expressly part of the employer's formal health plan or not.)

Although the AG's letter cites isolated phrases and sentences from certain Supreme Court opinions, and makes its own broad characterizations of some isolated concepts found in Supreme Court opinions, in order to support its view that the Proposal would survive a preemption challenge, it cites no case where a court at any level has upheld a law similar to the Proposal. In addition, the AG's letter dismisses summarily in a footnote the most compelling Supreme Court case to date supporting the position that the Proposal would be preempted by ERISA, District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125 (1992), where the Court held that ERISA preempted a local workers' compensation law that required employers to provide health plan coverage equivalent to that provided by the local workers' compensation program. The decision in Greater Washington Board of Trade was affirmed by the Supreme Court in the case most often cited by the AG's letter as supporting its position, New York Conference of Blue Cross & Blue Shield Plans v. Travelers, 514 U.S. 645 (1995).

In summary, nothing in the AG's letter alters my view that the Proposal is just the type of State regulation of employee benefit plans that ERISA's preemption provision was designed to prevent.

Please let me know if you have any questions on the above, or if you would like to discuss this issue in further detail.

Very truly yours,

A handwritten signature in cursive script that reads "Henry A. Smith, III". The signature is written in dark ink and is positioned above the typed name.

Henry A. Smith, III