

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RETAIL INDUSTRY LEADERS ASSOCIATION

*

Plaintiff

*

v.

*

Civil No. JFM-06-316

JAMES D. FIELDER, JR., in his official capacity as
Maryland Secretary of Labor, Licensing, and
Regulation

*

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Defendant

*

* * * * *

**BRIEF OF THE MARYLAND CHAMBER OF COMMERCE
AS *AMICUS CURIAE* IN SUPPORT OF THE COMPLAINT FOR DECLARATORY
AND PERMANENT INJUNCTIVE RELIEF**

DATED: March 17, 2006.

Respectfully submitted,

/s/

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INTEREST OF THE AMICUS

The Chamber is a statewide organization of over 800 businesses devoted to maintaining a favorable business climate in Maryland. The Chamber's mission is to maximize opportunities for its members and their employees to grow and prosper. By working with Maryland's executive and legislative branches of government, the Chamber seeks to make Maryland a better place to live, work and do business.

This case presents an issue of significant importance to the members of the Chamber due to the impact of this law on businesses in Maryland and the precedent that it would set for State intrusion on employer-sponsored health plans in Maryland. Certain members of the Chamber have over 10,000 employees in Maryland and therefore are directly impacted by this legislation. In addition, as other members of the Chamber grow to have over 10,000 employees in Maryland, they too would be directly impacted by this legislation.

The issue of the legal validity of this legislation has taken on added urgency by the introduction of legislation in the 2006 session of the General Assembly (House Bill 1510) that would seek to extend this law to every employer in Maryland.

ARGUMENT

The Fair Share Health Care Fund Act, MD. CODE ANN., LAB. & EMPL. tit. 8.5, §§ 101-107 (2006) (the "Act"), is preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1144 *et seq.* ("ERISA").

I. OVERVIEW OF THE ACT

The Act, passed into law on January 12, 2006 and taking effect January 1, 2007, requires covered employers (i.e., those with 10,000 or more employees in the State of Maryland) to make expenditures on employee health care for their Maryland employees that equal at least eight percent (for for-profit employers) or six percent (for non-profit employers) of compensation provided to Maryland employees. If an employer fails to meet the applicable threshold, the employer is required to pay the shortfall to the Maryland Secretary of Labor, Licensing and Regulation (which payment is then deposited to the State-run Fair Share Health Care Fund). In essence, the Act mandates that employers incur a specified level of health benefits costs, through their employer-sponsored health plans or, failing to do so, pay any shortfall as a penalty to the State-run Fund.

It is interesting to note that the Act will not truly remedy the perceived problem that too many Maryland residents lack employer provided health insurance. In fact, the Act's effect on the number of uninsured in Maryland will be negligible or non-existent. The Act fails to address the underlying reasons for the lack of health coverage among lower-income workers, and ignores various practical solutions to the problem. Instead, the Act arbitrarily targets a single employer to bear financial and administrative burdens that have only the most attenuated relationship to the improvement of health coverage for Marylanders.

First, the Act will not increase the proportion of firms that offer health coverage. By its terms, the Maryland law applies only to very large employers who are by far the most likely to offer health coverage already. See, Agency for Healthcare Research and Quality (AHRQ), Center for Financing, Access, and Cost Trends, *2003 Medical Expenditure Panel Survey—Insurance Component* (July 2005) (99 percent of uninsured workers in firms with 1,000 or more

employees are offered health coverage by their employer). It is very small firms that are comparatively unlikely to offer health coverage. See, id. (only 46 percent of uninsured workers in firms with fewer than 10 employees are offered health coverage). The Act does nothing to encourage these smaller companies to offer health benefits to their employees.

Second, even where smaller employers do offer health benefits, many workers turn them down because they cannot afford their share of the premiums. See, e.g., U.S. Chamber of Commerce, Statement before the Senate Committee on Small Business and Entrepreneurship on Possible Solutions to the Small Business Health Care Crisis (February 5, 2003) (approximately one in six employees turn down coverage offered by their employer). The Act does nothing to address this problem.

Third, to the extent the Act has any impact at all upon employer contributions to health insurance premiums, this will likely be offset by reductions to other parts of the employee compensation package, starting with wages. Although the Act arguably forbids an employer to “deduct” expenditures for employee health insurance from wages, Md. Code Ann., Lab. & Empl., tit. 8.5, § 104(C), it does not (and indeed, could not plausibly) prohibit an employer from tailoring future changes in employee compensation to facilitate compliance. As such, employees who might otherwise receive a wage increase might well see such an increase cancelled or reduced to allow their employer to meet Maryland’s health care expenditure threshold. In short, the Act would yield no net increase in compensation; it would simply mandate that employees “spend” their compensation on health insurance premiums, as opposed to other household expenses.

Fourth, in enacting the provision, the Maryland General Assembly ignored a host of alternatives that are far more likely to substantially reduce the number of uninsured in the state.

For example, Maryland could seek a waiver from the federal government to enable the state to provide Medicaid coverage to adults without dependent children with incomes below the poverty line. See, Stan Dorn, et al., Medicaid and Other Public Programs for Low-Income Childless Adults: An Overview of Coverage in Eight States (August 2004) at ii. Alternatively, instead of punishing employers who already offer coverage for not spending more, Maryland could create a premium assistance program to help lower-income employees afford their share of employment-based coverage. Such programs are currently operating in a number of states. See, National Academy for State Health Policy, State Coverage Initiatives—Premium Assistance Toolbox for States, at http://www.patoolbox.org/_catdisp_page.cfm?LID=124. Another option is to establish a “reinsurance” program along the lines of the Healthy New York program, which helps managed care plans lower premiums by paying a share of medical expenses beyond an annual threshold, such as \$5,000. See, N.Y. Ins. Law § 4326 (McKinney 2006); see also State of New York Insurance Dept., Report on the Healthy New York Program 2005 (December 31, 2005).

In sum, the Act does not address the obvious underlying causes of the lack of health insurance among workers, and accordingly will have, at most, a negligible effect upon the number of uninsured in Maryland.

II. ERISA'S PREEMPTION RULE

ERISA section 514(a), 29 U.S.C. §§ 1144(a), provides that ERISA “supersedes... all State laws insofar as they... relate to any employee benefit plan....” [Emphasis supplied] One of the principal purposes of ERISA was to eliminate the possibility of a tangle of State laws impacting employee benefit plans, and instead to create a single, comprehensive, thoughtful, federal regulatory scheme for employer-provided benefits. Since ERISA's enactment in 1974, the courts repeatedly have struck down State laws directly or indirectly relating to employee benefit plans.

(The so-called “savings clause” of ERISA section 514 allows States to regulate insurance, but the so-called “deemer clause” of ERISA section 514 prohibits States from deeming employee benefit plans to be “insurance” in order to be able to regulate them under the savings clause. For example, the deemer clause prohibits a State from concluding that an employer's self-funded employee health plan is “insurance” in order to claim that the State may regulate it under the savings clause.)

III. ERISA'S PREEMPTION RULE AS INTERPRETED BY THE COURTS

The Supreme Court has interpreted the preemption clause to give the clause a “broad common-sense meaning,” concluding that “even if [a State] law is not specifically designed to affect [an employee benefit plan], or the effect is only indirect,” ERISA preempts the State law. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990). As directed by the statute, the Court has struck down State laws that merely “relate to” an employee benefit plan, concluding that “[a] law 'relates to' an employee benefit plan ... if it has a connection with or reference to such a plan”. Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

For example, the Court has held that ERISA preempts State laws -- like the Act -- that require employers to provide employee benefits measured against some State-mandated reference point. For example, in District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125 (1992), the Court, in applying the *Shaw* “reference to” test, 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 Court also has stated specifically that ERISA preempts State laws imposing a “substantive coverage requirement” or mandating certain benefits. For example, in Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985), the Court considered whether ERISA

preempted a State law mandating particular benefits in health insurance contracts issued in the State. The Court upheld the law under the savings clause, but noted that the law directly affected employee benefit plans and therefore that the deemer clause protects self-funded ERISA plans (like the plans of the Chamber's members in question) from this type of regulation.

IV. THE ACT IS PREEMPTED BY ERISA

The Act is precisely the type of State law intended to be preempted by ERISA. Specifically, the Act is a direct attempt to try to force employers to provide employee health benefits meeting a State-mandated design (i.e., costing at least the designated percentages of total wages), either directly or through a combination of contributions to their own plans plus contributions to the Fund.

Giving ERISA's preemption clause the "broad common-sense meaning" required under Ingersoll-Rand, the Act clearly "relates to" and affects employer's benefit plans, requiring them either to modify their health plans directly to "top them up" to the State-mandated cost level or to pay any shortfall to the State Fund. And the Act falls squarely within the type of State law found to be preempted in Greater Washington Board of Trade; that is, a State law mandating benefits measured against a State-mandated reference point (i.e., the eight percent or six percent cost mandated in the Act).

Finally, the Act also imposes a "substantive coverage requirement" on employers, thereby falling within the category of State laws that are preempted under Metropolitan Life. That is, although ERISA -- and its protective preemption provision -- leave employers free to provide any type of (or no) health benefits to their employees, the Act, as a practical matter, mandates the provision of health coverage through an ERISA-covered plan since no covered

employer will choose to contribute to the State Fund when it could spend the same amount directly for employee health care and obtain the resultant goodwill of its employees.

V. RESPONSES TO SPECIFIC COUNTER-ARGUMENTS

Some supporters of the Act argue that isolated statements taken from the opinions in two inapposite Supreme Court cases save the Act from preemption by ERISA. As will be shown below, these two inapposite cases provide little or no useful guidance concerning the application of ERISA's preemption rule to the Act, and these two inapposite cases certainly do not contradict the holdings in Greater Washington Board of Trade, Shaw and Metropolitan Life, all of which make clear that the Act is preempted by ERISA.

A. Travelers Case.

In New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance, 514 U.S. 645 (1995), a group of commercial insurers challenged a New York law that permitted hospitals to impose surcharges on charges incurred by individuals covered by a commercial insurer, but not on individuals covered by a Blue Cross/Blue Shield plan. The Court held that this State law was not preempted because the law did not relate to employee benefit plans but rather related to hospital charges and insurance company regulation, areas traditionally left to State regulation. Although the New York law had the indirect effect of causing insured employee benefit plans purchasing their insurance coverage from insurers other than Blue Cross to incur greater costs than employee benefit plans purchasing insurance through Blue Cross or employee benefit plans that were self-funded, the Court found the impact of the State hospital surcharge law on employee benefit plans to be too tenuous to fall within the scope of ERISA's preemption rule.

Of course, unlike the surcharge on insurers rule of the New York law, the Act -- by its very terms -- imposes employee benefit plan obligations directly on employers, whether the employers' benefit plans are insured or self-funded. Therefore, the Travelers decision does not support a claim that the Act avoids ERISA's preemption rule. In fact, the Court in Travelers stated expressly, in reference to its decision in Greater Washington Board of Trade, that a State law that "specifically refers to welfare benefit plans regulated by ERISA [like the law in question in that case] on that basis alone is pre-empted". See, 514 U.S. at 656. Therefore, because the Act "specifically refers to welfare benefit plans regulated by ERISA," the Travelers decision supports the conclusion that the Act is preempted by ERISA.

Additionally, it is worth noting that the Court in Travelers expressly recognized the need for uniform administration of employee benefit plans across all States as a main policy reason behind ERISA's preemption rule. The Court stated that "The basic thrust of the pre-emption clause was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans. Thus, ERISA pre-empts state laws that mandate employee benefit structures or their administration as well as those that provide alternative enforcement mechanisms." [Emphasis supplied] See, 514 U.S. at 646. Unless State laws like the Act are determined to be preempted by ERISA, the result will be a tangle of State laws impacting employee benefit plans, resulting in exactly the type of non-uniform administration that the Congress sought to prohibit and that the Court recognized in Travelers.

Finally, the Travelers opinion includes the following important language: "[W]e do not hold today that ERISA pre-empts only direct regulation of ERISA plans, or could we do that with fidelity to the views expressed in our prior opinions on this matter..." See, 514 U.S. at 668. As noted above, one of the prior opinions cited, and expressly affirmed, in the Travelers opinion

is Greater Washington Board of Trade, and the facts in Greater Washington Board of Trade are the closest to those of the Act of all the Supreme Court cases to date dealing with ERISA preemption.

B. Dillingham Case.

Another case sometimes cited by supporters of the Act is the Supreme Court's decision in California Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316 (1997), where the Court held that a California prevailing wage law that allowed employers to pay a lower wage to employees participating in a State-approved apprenticeship program than those not participating in such a program was not preempted by ERISA.

Like the Travelers decision, Dillingham dealt with facts radically different from those involved in the Act, rather than with very similar facts like those in Greater Washington Board of Trade where the State law was found to be preempted by ERISA. As with the Travelers case, the Dillingham case dealt with a subject area -- State prevailing wage laws -- traditionally left to the States to regulate, rather than directly relating to employee benefit plans as with the Act or the Greater Washington Board of Trade case. Additionally, the Dillingham opinion expressly confirms that a State law "relates to" ERISA plans if it "refers to" those plans or "has a significant connection with" those plans. It cannot be argued that the Act does not "refer to" or have a "significant connection with" ERISA plans. In fact, the entire point of the Act is to measure an employer's contributions to its ERISA plan, require it to report to the State annually about those contributions, and require it either to spend a certain amount on its ERISA plan or pay into the State's Fair Share Health Care Fund based on those contributions. The central purpose of the Act (i.e., to impose an assessment on employers based on the extent to which their health plan expenditures for their employees as a percentage of their total wages for a measuring

period falls below a specified percentage) clearly “relates to”, “refers to” and “has a significant purpose concerning” employers' ERISA plans.

C. Additional Arguments and Response to Same.

The following additional arguments are sometimes made by supporters of the Act:

Argument 1: The law does not require employers to establish ERISA plans, but instead only requires employers to spend a certain amount on them.

Response: This, obviously, is a distinction without a difference. If this were the test for ERISA preemption, the ERISA preemption doctrine would become meaningless because each State could regulate ERISA plans simply by regulating the amounts employers must spend on those plans. This would result in just the type of tangle of State regulation that the Congress sought to prevent with the ERISA preemption doctrine, and that the Supreme Court sought to prevent with its decision in Greater Washington Board of Trade.

Argument 2: The Act does not in any way constrain an employer's health plan design choices. Employers could, for example, establish on-site medical clinics to top-up their health expenditures to the eight percent/six percent State minimum, rather than change the design of their employee health plans or pay into the State Fund. Other 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 include 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.

Response: It is hard to envision how telling an employer to spend a designated percentage of its payroll on its own health plan, or contribute any shortfall to a State fund, “does not in any way constrain health plan design choices”. The on-site medical clinic suggestion is

neither realistic nor legally compelling, and clearly is not what the Act intended when it imposed health plan cost minimums on employers.¹ Likewise, the argument that the existence of other ways of avoiding the Act (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) means that the Act is not preempted by ERISA is likewise neither supported by the statute or case law, nor sensible. That is, nowhere in ERISA's preemption provision or the cases interpreting it is there a concept that suggests 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 unrealistic -- and unintended by the State statute itself -- action) in order to avoid it.

Argument 3: Although a State law directly requiring an employer to maintain an employee health plan costing a designated percentage of its payroll would be preempted by ERISA, a State law like the Act indirectly requiring an employer (by the imposition of the assessment) to maintain an employee health plan costing at least a designated percentage of its payroll would not be preempted by ERISA.

Response: 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 (and that the

¹ The U.S. Department of Labor's regulations provide that the provision of employee health care through an on-site clinic would qualify as an ERISA-covered plan unless the clinic's activities were limited to providing "treatment for minor injuries or illnesses or rendering first aid care in case of accidents occurring during working hours." See, 29 C.F.R § 2510.3-1(c)(2).

Supreme Court has sought to prohibit by its preemption decisions to date). For example, Maryland could impose an eight percent minus actual costs charge on employers with operations in Maryland, California could impose a ten percent 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 with a thoughtful, comprehensive federal scheme of employee benefit plan regulation.

VI. CONCLUSION

For the reasons cited above, the Act is preempted by ERISA. Therefore, the complaint for declaratory and permanent injunctive relief should be granted.

Respectfully submitted,

/s/

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Defendant

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of March, 2006, a copy of the foregoing
Brief of the Maryland Chamber of Commerce as *Amicus Curiae* In Support of the Complaint for
Declaratory and Permanent Injunctive Relief was sent, via the Court's electronic filing system,
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