Employee Retirement Income Security Act (ERISA) and State Health Reform

An Alliance for Health Reform Toolkit
August 10, 2007

This toolkit offers links to resources that will help readers better understand the relationship between ERISA and state-level health reform.

Introduction

Many policy experts believe that experimenting at the state level is the most politically feasible way to achieve health reform. Sweeping general reform to our national health care system, they argue, is not likely to happen without success stories from state programs. Some states, most notably Massachusetts and Vermont, are already implementing reform plans designed to greatly broaden insurance coverage.¹

Yet many state reforms may be in conflict with a federal statute know as the Employee Retirement Income Security Act, or ERISA.

ERISA was enacted in 1974 to establish uniform federal standards for private employee benefit plans. In addition to its primary purpose of protecting individuals from fraud and mismanagement of employer-sponsored benefit plans, it is intended to encourage multi-state companies to provide benefits for their employees by allaying fears of inconsistent regulations among states.²

Like many federal statutes, ERISA has a preemption clause. It states that “the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan….”³ In other words, ERISA prohibits state laws that directly regulate employer-sponsored health plans.

The Supreme Court has held that ERISA also preempts state laws that have a considerable financial or administrative impact on these plans. For example, since ERISA does not require employers to provide a minimum level of benefits, a state cannot require private employers to offer benefits or set a minimum amount an employer must contribute when offering coverage.

Under ERISA, however, states retain the power to regulate “the business of insurance.”4 Thus, states can still do things like tax and regulate traditional insurers performing traditional insurance functions.

States may regulate the insurance product that insurers sell to employer-sponsored plans, and so may at times indirectly influence ERISA plans. However, plans self-insured by the sponsor are completely beyond state jurisdiction, and thus covered only by ERISA.5 An employer self-insures if it directly assumes responsibility for the cost of its employees’ health care, as opposed to paying an insurance company to do so. Most larger firms are self-insured.

Concern from smaller firms about the cost of health care under state-level mandated benefit laws has generated recent proposals in Congress to expand the scope of ERISA to include types of small business health plans.6 The bills intended to make it easier for companies to operate by eliminating the constraints of 51 different sets of regulations and rules.7 Opponents argue, among other things, that the legislation would prevent states from prohibiting the discriminatory pricing of insurers among small businesses.8

Another ERISA preemption issue occurs with respect to so-called “pay or play” laws. One formulation of such laws is to require both public and private employers to pay a tax to fund a public health coverage program, but giving employers a credit against this tax if they cover their own workers. It is unclear whether pay or play laws will survive ERISA preemption challenges.

**Employee Retirement Income Security Act—ERISA**

U.S. Department of Labor

[www.dol.gov/dol/topic/health-plans/erisa.htm](http://www.dol.gov/dol/topic/health-plans/erisa.htm)

This government website provides an overview of the purpose and effects of ERISA and its subsequent amendments. Additionally, the site offers assistance to employers in understanding and complying with the requirements of ERISA, as well as information for consumers on federal health benefits laws in general.

---

4 29 U.S.C. § 1144(b)(2)(A), known as the “savings clause.”
5 29 U.S.C. § 1144(b)(2)(B), known as the “deemer clause.”
6 In 109th congress, H.R. 525 (S. 406); H.R. 2355 (S. 1015); and S. 1955.
Full text of ERISA, 29 U.S. Code Chapter 18

FindUSLaw
http://finduslaw.com/employee_retirement_income_security_act_erisa_29_u_s_code_chapter_18

FindUSLaw presents the full text of the ERISA law.

ERISA Pre-emption and Health Care Reform: A History Lesson
Michael Gordon
Employee Benefit Research Institute
March 1993 / May 2007

From the perspective of someone intimately involved in the writing and implementing of the ERISA law, Michael Gordon recounts the political culture that led to the adoption of ERISA’s broad preemption clause. He notes that future conflict between ERISA and state health reform initiatives was foreseeable but necessary to enact the federal law at that time. This article first appeared during debates over the Clinton Administration’s health reform plan.

ERISA Does Not Preempt Illinois HMO Statute Mandating Independent Review Mechanism for Claims Denials
Jacqueline Saue
Law Watch
July 23, 2002

The law offices of Foley & Lardner explain the case of Rush Prudential HMO, Inc. v. Moran. Moran concluded that an Illinois statute requiring HMOs to submit certain denials of coverage to an independent review mechanism was saved from ERISA preemption as a law that “regulates insurance.” This decision expanded the power of states to regulate HMOs and other insurers notwithstanding ERISA.

Appeals Court Upholds Wal-Mart Health Benefits Decision
Ylan Mui
Washington Post
January 17, 2007
www.washingtonpost.com/wp-dyn/content/article/2007/01/17/AR2007011701644.html

This story describes the ERISA preemption challenge that ultimately resulted in an invalidation of Maryland’s so-called “Wal-Mart” law, or Fair Share Act. In practice, the law would have forced Wal-Mart—and no other company—to spend at least 8 percent of payroll on employee health benefits or pay the difference to the state Medicaid fund.
ERISA Implications for State Health Care Access Initiatives: Impact of the Maryland ‘Fair Share Act’ Court Decision
Patricia Butler
State Coverage Initiatives and National Academy for State Health Policy
November 2006
http://statecoverage.net/SCINASHP.pdf

Writing after the federal district court’s 2006 ruling on Maryland’s Fair Share Act, Patricia Butler discusses ERISA preemption principles before giving an in-depth look at the Maryland law and court decision. She then analyzes the likely impact of the Maryland case on health care laws in Massachusetts, Vermont, and Wisconsin, and finally offers arguments that may be raised to challenge and defend such state programs.

For a February 2007 update, with a section on implications for state health care access options, go to http://statecoverage.net/SCINASHP2.pdf

Fighting ERISA erosion
Jill Elswick
Employee Benefit News
July 1, 2007

Employee Benefit News, a publication serving employee benefits decision-makers, offers this article explaining how ERISA may affect state health reform laws, particularly in Massachusetts. Like the writers of the previous two articles, Jill Elswick notes that Maryland’s “Wal-Mart” law was struck down because a federal appeals court concluded that ERISA preempted the state law.

RILA’s Legal Challenge to Health Spending Mandates
Retail Industry Leaders Association
Updated 2007

This issue summary describes the legal rationale for the Retail Industry Leaders Association’s challenges to state and local insurance mandate laws. RILA led successful ERISA preemption challenges against such laws enacted by the state of Maryland (see items above) and Suffolk County, New York.
Hiding in Plain View: ERISA Preempts Provisions of Massachusetts ‘Pay or Play’ Health Care Reform Law
William Schiffbauer
BNA’s Health Care Policy Report
September 18, 2006

Although the Massachusetts pay or play law has yet to receive any legal challenge with respect to ERISA, William Schiffbauer argues that three key provisions of the law would be preempted by the federal statute because they “relate to” employee benefit plan regulation. Schiffbauer contends that the law’s minimum employer contribution mandate, “free rider” surcharge, and establishment of a cafeteria plan all contravene ERISA’s purpose and are in conflict with its preemption clause.

Pay or Play Laws, ERISA Preemption, and Potential Lessons from Massachusetts
Amy Monahan
University of Missouri – Columbia School of Law
February 2007

Amy Monahan examines the similarities and differences between Maryland’s and Massachusetts’ respective pay or play laws. Despite the ruling that overturned the Maryland law, Monahan argues that that Massachusetts’ law is likely to survive an ERISA preemption challenge because of its relatively weak “pay” provision and because compliance with other provisions does not need to involve any ERISA plan.

Broken links: Please email info@allhealth.org if you find that any of the links mentioned above no longer work.

Selected Experts and Websites

Analysts/ Advocates

Lawerence Atkins................................................................. 202/463-7372
Exec. Director of Public Policy & Reimbursement, Schering-Plough Co.
Phyllis Borzi................................................................. 202/530-2312
Research Professor, George Washington Univ. Dept. of Health Policy
William Custer .......................................................................................................... 404/651-3041
Associate Professor, Georgia State University

Roger Feldman .......................................................................................................... 612/624-5669
Professor, University of MN, Div. of Health Services Research and Policy

David Frankford ....................................................................................................... 856/225-6412
Professor, Rutgers University School of Law

Mila Kofman .............................................................................................................. 202/784-4580
Associate Professor, Georgetown Univ. Health Policy Institute

Amy Monahan ........................................................................................................... 573/882-6753
Professor, University of Missouri Law School

Sara Rosenbaum ..................................................................................................... 202/530-2343
Professor of Health Law and Policy, George Washington Univ. School of Public Health

Rand Rosenblatt ...................................................................................................... 856/225-6379
Professor, Rutgers University School of Law

William Sage ........................................................................................................... 512/232-7806
Professor, University of Texas - Austin

William Schiffbauer ............................................................................................... 202/204-3030
Attorney, Schiffbauer Law Office

Linda Shore ............................................................................................................... 202/263-3284
Attorney, Mayer, Browne, Rowe & Maw, LLP

Christopher Summers ............................................................................................. 240/686-3510
President, Maryland Public Policy Institute

David Super ............................................................................................................... 410/706-7365
Professor of Law, University of Maryland Law School

Laura Tobler ............................................................................................................. 303/364-7700
Health Policy Analyst, National Conferences of State Legislatures

Stakeholders

Paul Dennett ............................................................................................................. 202/289-6700
Vice President of Health Policy, American Benefits Council

Paul Fronstin ............................................................................................................ 202/775-6352
Health Research Program Director, Employee Benefit Research Institute

James P. Gelfand ...................................................................................................... 202/463-5987
Senior Manager, Health Policy, U.S. Chamber of Commerce

Kate Sullivan Hare .................................................................................................. 479/273-4000
Director of Health Care Policy, Wal-Mart Stores Inc.

Joseph Harten ......................................................................................................... 512/345-9999
Senior Consultant, Towers Perrin

Mark Johnson ......................................................................................................... 817/909-0778
Founder, ERISA Benefits Consulting

Charles Kahn ............................................................................................................ 202/624-1534
President, Federation of American Hospitals

Dallas Salisbury ...................................................................................................... 202/659-0670
CEO, Employee Benefit Research Institute
Mark Ugoretz  ............................................................................................................ 202/789-1400
President, ERISA Industry Committee

Websites

Alliance for Health Reform ................................................................. www.allhealth.org
The Commonwealth Fund ............................................................................. www.cmwf.org
Department of Labor .................................................................................... www.dol.gov
Employee Benefit Research Institute ......................................................... www.ebri.org
Kaiser Family Foundation ............................................................................... www.kff.org
National Academy for State Health Policy .................................................. www.nashp.org
Robert Wood Johnson Foundation ............................................................. www.rwjf.org
State Coverage Initiatives ERISA portal .............................................. www.statecoverage.net/erisa.htm

Ben Cooper wrote the original draft of this toolkit.