



## **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.<sup>1</sup>

Yet many state reforms may be in conflict with a federal statute known 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.<sup>2</sup>

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....”<sup>3</sup> In other words, ERISA prohibits state laws that directly regulate employer-sponsored health plans.

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<sup>1</sup> Butler, Patricia. “ERISA Implications for State Health Care Access Initiatives: Impact of the Maryland ‘Fair Share Act’ Court Decision.” State Coverage Initiatives and National Academy for State Health Policy, November 2006.

<sup>2</sup> Butler, Patricia. “ERISA Preemption Manual for State Health Policymakers.” State Coverage Initiatives and National Academy for State Health Policy, January 2000.

<sup>3</sup> 29 U.S.C. § 1144(a).

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.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> The bills intended to make it easier for companies to operate by eliminating the constraints of 51 different sets of regulations and rules.<sup>7</sup> Opponents argue, among other things, that the legislation would prevent states from prohibiting the discriminatory pricing of insurers among small businesses.<sup>8</sup>

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.

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<sup>4</sup> 29 U.S.C. § 1144(b)(2)(A), known as the “savings clause.”

<sup>5</sup> 29 U.S.C. § 1144(b)(2)(B), known as the “deemer clause.”

<sup>6</sup> In 109<sup>th</sup> congress, H.R. 525 (S. 406); H.R. 2355 (S. 1015); and S. 1955.

<sup>7</sup> Kofman, Mila and Karen Pollitz. “Health Insurance Regulation by States and the Federal Government: A Review of Current Approaches and Proposals for Change.” Georgetown University Health Policy Institute, April 2006.

<sup>8</sup> “S. 1995: The Wrong Prescription for Cost and Coverage.” National Partnership for Women and Families.

## **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](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

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=988412](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=988412)

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

[http://www.foley.com/files/tbl\\_s31Publications/FileUpload137/982/law\\_watch\\_2002v23.pdf](http://www.foley.com/files/tbl_s31Publications/FileUpload137/982/law_watch_2002v23.pdf)

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](http://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

<http://ebn.benefitnews.com/asset/article/106969/fighting-erisa-erosion.html>

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

[www.retail-leaders.org/latest/rlGovAffairs.aspx?section=GOVEIS&id=53&cid=13](http://www.retail-leaders.org/latest/rlGovAffairs.aspx?section=GOVEIS&id=53&cid=13)

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

[www.allhealth.org/publications/Private\\_health\\_insurance/ERISA\\_Preempts\\_Provisions\\_of\\_Massachusetts\\_Health\\_Care\\_Reform\\_Law\\_62.pdf](http://www.allhealth.org/publications/Private_health_insurance/ERISA_Preempts_Provisions_of_Massachusetts_Health_Care_Reform_Law_62.pdf)

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

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=960554](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=960554)

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](mailto:info@allhealth.org) if you find that any of the links mentioned above no longer work.

## **Selected Experts and Websites**

### **Analysts/ Advocates**

**Lawrence 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*

<b>William Custer</b> .....	404/651-3041
<i>Associate Professor, Georgia State University</i>	
<b>Roger Feldman</b> .....	612/624-5669
<i>Professor, University of MN, Div. of Health Services Research and Policy</i>	
<b>David Frankford</b> .....	856/225-6412
<i>Professor, Rutgers University School of Law</i>	
<b>Mila Kofman</b> .....	202/784-4580
<i>Associate Professor, Georgetown Univ. Health Policy Institute</i>	
<b>Amy Monahan</b> .....	573/882-6753
<i>Professor, University of Missouri Law School</i>	
<b>Sara Rosenbaum</b> .....	202/530-2343
<i>Professor of Health Law and Policy, George Washington Univ. School of Public Health</i>	
<b>Rand Rosenblatt</b> .....	856/225-6379
<i>Professor, Rutgers University School of Law</i>	
<b>William Sage</b> .....	512/232-7806
<i>Professor, University of Texas - Austin</i>	
<b>William Schiffbauer</b> .....	202/204-3030
<i>Attorney, Schiffbauer Law Office</i>	
<b>Linda Shore</b> .....	202/263-3284
<i>Attorney, Mayer, Browne, Rowe &amp; Maw, LLP</i>	
<b>Christopher Summers</b> .....	240/686-3510
<i>President, Maryland Public Policy Institute</i>	
<b>David Super</b> .....	410/706-7365
<i>Professor of Law, University of Maryland Law School</i>	
<b>Laura Tobler</b> .....	303/364-7700
<i>Health Policy Analyst, National Conferences of State Legislatures</i>	

**Stakeholders**

<b>Paul Dennett</b> .....	202/289-6700
<i>Vice President of Health Policy, American Benefits Council</i>	
<b>Paul Fronstin</b> .....	202/775-6352
<i>Health Research Program Director, Employee Benefit Research Institute</i>	
<b>James P. Gelfand</b> .....	202/463-5987
<i>Senior Manager, Health Policy, U.S. Chamber of Commerce</i>	
<b>Kate Sullivan Hare</b> .....	479/273-4000
<i>Director of Health Care Policy, Wal-Mart Stores Inc.</i>	
<b>Joseph Harten</b> .....	512/345-9999
<i>Senior Consultant, Towers Perrin</i>	
<b>Mark Johnson</b> .....	817/909-0778
<i>Founder, ERISA Benefits Consulting</i>	
<b>Charles Kahn</b> .....	202/624-1534
<i>President, Federation of American Hospitals</i>	
<b>Dallas Salisbury</b> .....	202/659-0670
<i>CEO, Employee Benefit Research Institute</i>	

**Mark Ugoretz** ..... 202/789-1400  
*President, ERISA Industry Committee*

**Websites**

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

*Ben Cooper wrote the original draft of this toolkit.*