

Preemption of Local Healthcare Efforts

by Devala Janardan, Associate Counsel

In 2006, San Francisco's Board of Supervisors passed a revolutionary ordinance establishing a healthcare program providing coverage for all residents.[1] The Health Care Security Ordinance[2] (HCSO) is divided into the Health Access Plan (HAP), and the employer spending requirements (ESR). HAP provides the eligibility criteria and administrative directions for the healthcare program; the ESR, the more controversial provision, requires covered employers to make healthcare expenditures for their covered employees. For example, an employer with over 99 employees is required to spend at least $1.76/ hour on healthcare benefits per employee. If the employer does not participate in a healthcare (or health insurance) plan, it is required to contribute this dollar amount to the City's healthcare program. If the employer spends more than the $1.76/hour per employee minimum, it is not required to contribute anything to the fund.

The Golden Gate Restaurant Association (GGRA), an industry trade association, filed a complaint alleging that the federal Employee Retirement Income Security Act of 1974[3] (ERISA) preempted the ESR requirements. The district court agreed and enjoined the implementation of the ESR on preemption grounds.[4] Subsequently, the Ninth Circuit Court of Appeals granted a stay of that ruling, and on September 30, 2008, the Ninth Circuit ruled on the merits, finding that the ESR provisions were not preempted by ERISA.[5]

Congress enacted ERISA "to safeguard employees from the misuse and mismanagement of funds accumulated to finance various types of employee benefits."[6] The Act applies to employee pension, health, and other benefit plans provided by private employers. ERISA contains an explicit preemption clause: Section 514 (a) preempts "any and all State laws insofar as they may nor or hereafter relate to any employee benefit plan ...."[7] The phrase "relate to" has been subjected to great scrutiny and interpretation by various courts, including the U.S. Supreme Court, which attempted to flesh out the meaning of the phrase in *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.* There, the Supreme Court stated that a state law "relate[s] to" an employee benefit plan "if it has a connection with or reference to such a plan."[8]

In *Golden Gate*, the Ninth Circuit analyzed the two methods by which ERISA would preempt the HCSO: first, if the ESR creates a *de facto* ERISA benefit plan; second, if the ESR "relate[s] to" the existing ERISA plans of covered employers. With regards to the first method, the Ninth Circuit relied on prior Supreme Court precedent and concluded that "an employer's obligation to make monetary payments based on the amount of time worked by an employee, over and above ordinary wages, does not necessarily create an ERISA plan."[9] In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Supreme Court held that a statute requiring an employer to pay predetermined benefits to an employee upon termination, did not create a "plan" within the meaning of ERISA because it required no "administrative scheme whatsoever" to meet the employer's obligation. In *Golden Gate*, the court used a similar rationale, stating that "an employer's administrative duties must involve the application of more than a modicum of discretion in order for those administrative duties to amount to an ERISA plan."[10] The duties to make required payments and keep records of the payments did not amount to an administrative scheme requiring more than a "modicum of discretion." The second argument the court addressed was whether the HCSO "relate[s] to" an employee benefit plan. The GGRA cited examples where state-mandated plans were found to be ERISA-preempted, such as *Standard Oil Co. of Calif. v. Agsalud*.[11] Hawaii passed a statute requiring employers, doing business in Hawaii, to provide employees with a healthcare plan and to pay half of the premiums. The Ninth Circuit held that ERISA preempted the state law that forced private employers to offer and pay for employee health insurance. However, the Ninth Circuit in *Golden Gate* found that the HCSO was far different than the law in *Agsalud*: the HCSO did not require employers to adopt an ERISA plan, nor did it require them to change existing benefit plans. The distinguishing feature from *Agsalud* was that an employer "may *choose* to adopt or to change an ERISA plan in lieu of making the required health care expenditures."[12]

The Ninth Circuit relied on other cases. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), a New York statute required hospitals to collect a surcharge from patients covered by any insurance company other than Blue Cross/Blue Shield. The rationale was that Blue Cross/Blue Shield provided prompt payment of claims, and also insured patients that were rejected by other insurance companies. The Supreme Court, while recognizing that the law could influence buyers of insurance, held that "an indirect economic influence...does not bind plan administrators to any particular choice and thus [does not] function as a regulation of an ERISA plan itself." The Ninth Circuit, relying on *Travelers*, stat-

ed that ERISA preemption did not apply to the HCSO since employers were not bound to any particular benefit choice, and, just as importantly, there was no provision forcing a covered employer to change, in any way, how an existing ERISA health benefit plan was administered. Accordingly, the court rejected the preemption argument, and reversed and remanded with instructions to enter summary judgment in favor of the City.

In contrast, a preemption argument was used successfully in *Retail Industry Leaders Ass'n v. Fielder*, involving a Maryland law requiring employers with more than 10,000 employees to pay, to a state-administered fund, up to 8% of the total wages for employee health insurance.[13] The court found that, because the law "effectively mandates that employers structure their employee healthcare plans to provide a certain level of benefits, the Act has an obvious 'connection with' employee benefit plans and so is preempted by ERISA."[14]

Given the state of the law and that more communities may adopt measures to provide for employee healthcare, there may be calls from around the country for the Supreme Court to tackle the issue of ERISA preemption.

Notes

1. The coverage includes preventative care, emergency and urgent care, family-planning services, mental health evaluations, and other services. *See* http://www.healthysanfrancisco.org.
2. San Francisco, Cal., Admin. Code §14, Health Care Security Ordinance (2006).
3. Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq* (2007).
4. Golden Gate Rest. Ass'n v. City & County of San Francisco, 535 F. Supp. 2d 968 (N.D. Cal. 2007).
5. Golden Gate Rest. Ass'n v. City & County of San Francisco, No. 07-17372, 2008 WL 4401387 (9th Cir. Sept. 30, 2008).
6. Massachusetts v. Morash, 490 U.S. 107, 112 (1989).
7. 29 U.S.C. §1144(a).
8. 519 U.S. 316, 324 (1997).
9. 2008 WL 4401387 at *8.
10. *Id.* at *10.
11. 633 F. 2d 760 (9th Cir. 1980), *judgment aff'd*, 454 U.S. 801 (1981).
12. 2008 WL 4401387 at *15 (emphasis added).
13. 475 F. 3d 180, 193 (4th Cir. 2007).
14. *Id.* at 194. ML

