

ERIC CONTINUES TO FIGHT FOR ERISA LAW AND NATIONAL UNIFORMITY

- ◆ *Are there any areas where ERIC should consider participating in litigation to protect ERISA or comment on proposed regulations?*

EXECUTIVE SUMMARY: ERIC has been fighting attempts to weaken or circumvent ERISA preemption for almost 30 years. In early May 2007, in response to threats by several Members of Congress and state health advocates, ERIC created a coalition, with the active participation of major Washington DC trade associations and large employers, to support ERISA preemption and educate Congressional members on the importance of preserving uniformity and flexibility for major employers who sponsor health and benefit plans throughout multiple jurisdictions.

Through its role as steering committee member, and Policy Committee co-chair of the recently formed National Coalition on Benefits (NCB) (to which the ERIC lead ERISA Preemption Coalition was a precursor), ERIC has helped lead and organize the employer community in this current round of ERISA attrition. The NCB has lead a comprehensive lobbying effort, and has completed education and lobbying meetings with all of its “tier-one” members; those that will play the most significant role in deciding the fate of ERISA, and employer health benefits.

ERIC has met with Rep. Rob Andrews (D-NJ), Chairman of the House Subcommittee on Health, Employment, Labor, and Pensions (HELP) of the Education and Labor Committee—seemingly the petri dish from which anti-preemption legislation is likely to arise—at his request and made clear that ERIC could not agree to anything akin to state waivers on preemption.

BACKGROUND: Since the new year, much has happened on the ERISA front. Most notably, the San Francisco Health Security Ordinance was allowed to take affect by the Ninth Circuit Court of Appeals. The Ordinance mandates that

- employers, who meet a certain employee threshold, must spend at least \$1.17 or \$1.76 (depending on size of workforce) on employee health benefits per worker, per hour
- uses proceeds to expand access and care on public programs

The district court that first heard the case, agreed with ERIC that it clearly violated section 514 ERISA--the “Preemption Clause.” Presiding Judge Jeffrey White analyzed the mandate as having “an impermissible connection with employee welfare benefit plans” and “interfer[ing] . . . with employer autonomy over whether and how to provide employee health coverage, and ensuring uniform national regulation of such coverage.”

The District Court also held that the obligation the ordinance imposes on employers to keep records of health care expenditures further undermines the lawmakers’ intent in drafting ERISA 30 years ago. Judge White wrote, “The Ordinance requires employers to maintain accurate records of all health care expenditures, allow the City access to all such records, and provide information regarding health care expenditures to the City on an on-going basis.” According to the court, the ordinance thus contradicts the

purpose of ERISA, which is to “to establish a [nationally] uniform administrative scheme, which provides a set of claims and disbursements of benefits.”

However, the appeals court issued an order of stay on that ruling, allowing the Ordinance to go into effect, deeming it to have a good chance of succeeding in its full appeal. ERIC plans on filing an amicus brief on behalf of the claimant, the Golden Gate Restaurant Association.

To avoid a similar legal battle, many states are pushing for the erosion of ERISA preemption, by soliciting the Federal Government for “ERISA Waivers;” the most prominent cases being Maryland, Massachusetts, Vermont, California, and apparently New Jersey, Rep. Andrews’ home state. Some states have passed legislation attempting to bypass ERISA, exposing employers to myriad and diverse statutes and regulations. Also, some states are seeking to fund their own healthcare initiatives by taxing- ERISA plans, and attempting to secure reporting and “minimum benefit” mandates.

In Congress, the House Education and Labor Subcommittee on HELP convened a hearing on May 22, 2007, in which some members (Baldwin, Tierney, Tom Price) expressed a desire to enact legislation that would effectively strike down ERISA’s preemption clause, and pave the way for state governments to impose an array of new taxes and mandates on employers.

The resources employers who operate across state lines would be forced to commit in order to interpret and comply with different sets of rules in each of the fifty states would surely overwhelm many of them into choosing to scale back, or cut, benefits altogether. ERIC outside counsel Amy Moore (Covington and Burling) and Honeywell counsel, Kevin Covert, testified at that hearing, stressing that states have many avenues through which they can expand coverage and reform the healthcare market, without impeding ERISA plans.

There are also state reform efforts underway in both California and Ohio. California’s Governor backed reform proposal was recently defeated in a State Senate Committee due to inadequate funding. ERIC is closely monitoring the Ohio proposal, which seeks to regulate the contracts by which doctors are compensated from health plans, including self-funded employer plans.