THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE ERISA INDUSTRY COMMITTEE, Plaintiff, v. CITY OF SEATTLE, Defendant.	Case No. 2:18-01188-TSZ DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: DECEMBER 6, 2018 **ORAL ARGUMENT REQUESTED**

KELLER ROHRBACK L.L.P.
AuthorOfficeAddress
TELEPHONE: AuthorOfficeGeneralNo1
FACSIMILE: AuthorOfficeFaxNo1

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STANDARD OF REVIEW 4

III. BACKGROUND: PART 3 OF THE SEATTLE ORDINANCE 5

IV. ARGUMENT 6

A. The Unwavering Presumption Against Preemption Applies in This Case. 8

B. The Ordinance Does Not Impermissibly "Reference" ERISA Plans. 13

1. Part 3 of the Ordinance Does Not Operate "Immediately and Exclusively" Upon ERISA Plans. 14

2. ERISA Plans Are Not "Essential" to the Operation of the Ordinance. 17

3. Part 3 Does Not Impermissibly Reference Taft-Hartley Plans. 22

C. The Ordinance Does Not Have an Impermissible "Connection with" ERISA Plans. 24

D. The Court Can and Should Grant the City's Motion to Dismiss Without Leave to Amend; If It Denies that Motion, and Does Not Outright Deny ERIC's Summary Judgment Motion, It Should Deny or Defer Ruling on That Motion Until the City is Permitted to Take Discovery. 31

V. CONCLUSION 33

KELLER ROHRBACK L.L.P.
AuthorOfficeAddress
TELEPHONE: AuthorOfficeGeneralNo1
FACSIMILE: AuthorOfficeFaxNo1

TABLE OF AUTHORITIES

Cases

Aloe Vera of Am., Inc. v. U.S.,
699 F.3d 1153 (9th Cir. 2012) 4, 5

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 4

Arizona v. Inter Tribal Council of Ariz., Inc.,
570 U.S. 1 (2013) 10

Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers,
903 F.3d 829 (9th Cir. 2018) ..... *passim*

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 4

Bell v. Blue Cross of Blue Shield of Okla.,
823 F.3d 1198 (8th Cir. 2016), *cert denied*, 137 S. Ct. 1812 (2017) 9, 11

Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A.,
519 U.S. 316 (1997) ..... *passim*

Cervantes v. Countrywide Home Loans, Inc.,
656 F.3d 1034 (9th Cir. 2011) 4

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 9

D.L. v. Aetna, Inc.,
No. 18-893, 2018 WL 3869322 (C.D. Cal. Aug. 10, 2018) 10

De Buono v. NYSA-ILA Med. & Clinical Servs. Fund,
520 U.S. 806 (1997) 8, 10

DeCanas v. Bica,
424 U.S. 351 (1976) 9

District of Columbia v. Greater Washington Board of Trade,
506 U.S. 125 (1992) 2, 19, 20

Egelhoff v. Egelhoff ex rel. Breiner,
532 U.S. 141 (2001) 24

Emp. Staffing Servs., Inc. v. Aubry,
20 F.3d 1038 (9th Cir. 1994) 16, 21

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Fort Halifax Packing Co. v. Coyne,
482 U.S. 1 (1987) 26

Gobeille v. Liberty Mut. Ins. Co.,
136 S. Ct. 936 (2016) ..... *passim*

Golden Gate Restaurant Ass'n v. City & County of San Francisco,
546 F.3d 639 (2008) ..... *passim*

Greater Wash. Bd. of Trade v. District of Columbia,
948 F.2d 1317 (D.C. Cir. 1991) 20

Hall v. BNSF Ry. Co.,
No. C13-2160-RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) 4

Helfrich v. Blue Cross & Blue Shield Ass'n,
804 F.3d 1090 (10th Cir. 2015) 11

In re Anthem, Inc. Data Breach Litig.,
No. 15-2617, 2016 WL 3029783 (N.D. Cal. May 27, 2016) 10

In re Premera Blue Cross Customer Data Sec. Breach Litig.,
No. 15-2633, 2017 WL 539578 (D. Or. Feb. 9, 2017) 10

Int'l Franchise Ass'n, Inc. v. City of Seattle,
97 F. Supp. 3d 1256 (W.D. Wash. 2015) 9

Jahn v. City of Seattle,
120 Wash. 403, 207 P. 667 (1922) 11

Kwan v. SanMedica Int'l,
854 F.3d 1088 (9th Cir. 2017) 4, 5

Lane v. Goren,
743 F.2d 1337 (9th Cir. 1984) 15

Mackey v. Lanier Collection Agency & Serv., Inc.,
486 U.S. 825 (1988) 14, 22, 23, 24

McClellon v. Capital One Bank, N.A.,
No. C18-909, 2018 WL 5240528 (W.D. Wash. Oct. 22, 2018) 4

Metro. Life Ins. Co. v. Massachusetts,
471 U.S. 724 (1985) 8

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,
514 U.S. 645 (1995) ..... *passim*

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Operating Eng'rs Health & Welfare Tr. Funds v. JWJ Contracting Co.,
135 F.3d 671 (9th Cir. 1998) 8

Pharm. Care Mgmt. Ass'n v. Gerhart,
852 F.3d 722 (8th Cir. 2017) 23

Retail Industry Leaders Ass'n v. Fielder,
475 F.3d 180 (4th Cir. 2007) 29, 30

RUI One Corp. v City of Berkeley,
371 F.3d 1137 (9th Cir. 2004) 9

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 21

Simons v. Cenveo Corp.,
No. C15-1598-JCC, 2017 WL 1079917 (W.D. Wash. Mar. 22, 2017).....31

Standard Oil Co. v. Agsalud,
633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981).....26

WSB Elec., Inc. v. Curry,
88 F.3d 788 (9th Cir. 1996) 9

Statutes

29 U.S.C. § 1003(b)(3).....21

29 U.S.C. § 1023.....25

29 U.S.C. § 1024(a)(2)(B).....25

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C.
§1001, et seq. .....*passim*

Seattle, Wash., Mun. Code § 14.04 (2018) 11

Seattle, Wash., Mun. Code § 14.16 (2018) 11

Seattle, Wash., Mun. Code § 14.19 (2018) 11

Seattle, Wash., Mun. Code § 14.20 (2018) 11

Seattle, Wash., Mun. Code § 14.22 (2018) 12

Seattle, Wash., Mun. Code § 14.24 (2018) 19

Seattle, Wash., Mun. Code § 14.25 (2018) .....*passim*

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Wash., Ordinance 125,627 (July 23, 2018) (SMC § 14.23 Domestic Workers - effective July 1, 2019) 12

Rules

Fed. R. Civ. P. 12(b)(6) 4, 17

Fed. R. Civ. P. 56(a) 31

Fed. R. Civ. P. 56(a), (c)(1) 4

Fed. R. Civ. P. 56(d) 32

Seattle Office of Labor Standards, Seattle Human Rights Rules § 150-210 (2018) 22

Other Authorities

Black's Law Dictionary (10th ed. 2014) 15, 18

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

I. INTRODUCTION

The Seattle law at issue in this action, Part 3 of the Seattle Hotel Employees Health and Safety Initiative ("the Ordinance"), requires large hotels to pay their employees additional compensation sufficient to enable those employees to purchase health care coverage for themselves and their families. The Ordinance also includes detailed provisions protecting the safety of hotel workers. Protecting the health and safety of its citizens and those employed within its borders is a classic exercise of governmental police powers. So too are laws by which governments try to ensure that employees are paid livable wages.

The Supreme Court has repeatedly held that state laws which constitute exercises of such police powers are presumed not to be preempted by ERISA. Remarkably, Plaintiff, The ERISA Industry Committee ("ERIC"), seeks to have this Court reject clear and continuing Supreme Court precedent based on statements in dissenting and concurring opinions, some of which were made by Justices no longer on that Court. Of course, this Court should not do so. Thus, the Ordinance is entitled to a presumption that it is not preempted.

Moreover, regardless of whether a presumption against preemption applies, Part 3 of the Ordinance does not run afoul of either of the controlling standards for ERISA preemption: it neither makes impermissible "reference to," nor has an impermissible "connection with," ERISA plans. With regard to the "reference to" test, the Ordinance imposes standards exclusively on *employers*, not ERISA plans, and is entirely agnostic as to whether any employer has an ERISA plan. Moreover, the amount of additional compensation that must be paid by the hotel employers is measured by reference to "gold-level" plans available on the Washington health care exchange, not by reference to ERISA plans. Although an employer may elect to take advantage of optional exceptions from this compensation requirement if it provides gold-level benefits through its benefit plan or participates in a Taft Hartley benefit plan (i.e., a plan collectively bargained with employee unions), the Ordinance does not *require* anything with

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

respect to benefit plans. Such optional alternatives to a statutory compensation requirement do not constitute an impermissible "reference to" ERISA plans, as cases have long recognized.

ERIC bases its "reference to" argument on two cases: *District of Columbia v. Greater Washington Board of Trade* (*Greater Washington*), 506 U.S. 125 (1992), and *Golden Gate Restaurant Ass'n v. City & County of San Francisco* (*GGRA*), 546 F.3d 639 (2008). But the former is clearly distinguishable and the latter *rejected* an argument that an ordinance referred to ERISA plans merely because it gave employers the option of complying with a statutory requirement by amending their ERISA plans. Indeed, the Ninth Circuit in *GGRA* concluded that because the ordinance could have full effect even if no employer had an ERISA plan, it did not make an impermissible "reference to" ERISA plans. This same conclusion applies here.

Additionally, Part 3 of the Ordinance does not have an impermissible "connection with" ERISA plans. ERIC argues at length that one of Congress's purposes in enacting ERISA's preemption provisions was to enable employers to maintain uniform multi-state plans. But nothing in the Ordinance precludes that. The Ordinance does not require hotels to amend existing ERISA plans or establish separate ERISA plans for their Seattle workers. If multi-state uniformity of plan terms and/or plan administration is a hotel's over-riding policy goal, it may simply pay additional compensation to its Seattle employees and make no changes to any ERISA plan.

ERIC argues, however, that this choice is not a real choice because it will cost too much to pay the additional wages; i.e., the hotels covered by the Ordinance will be forced to choose to adopt ERISA plans or amend their existing plans. However, as discussed in the City of Seattle's (the "City") moving papers and below, even if ERIC were correct about the relative costs of complying with Part 3 of the Ordinance, the Supreme Court has made it clear that neither the mere fact that a state law may increase costs for ERISA plans, nor the fact that an employer can save money by complying with a law through use of an ERISA plan, will render the law preempted.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

ERIC relies on *dicta* suggesting that a state law "might" have an impermissible "connection with" an ERISA plan if it produces such "acute, albeit indirect, economic effects" as to "'force an ERISA plan to adopt a certain scheme of substantive coverage.'" *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) (citation omitted). Putting aside, for argument's sake, the fact that ERIC cites *no* case in which the Supreme Court or the Ninth Circuit has actually relied on this premise to strike down a statute, ERIC still cannot avoid dismissal. Indeed, even if the two untested and unsubstantiated declarations from hotel employees submitted with its motion for summary judgment were considered to be part of the pleadings (which they may not), they do not set forth factual information that plausibly demonstrates that for every ERIC-member hotel in Seattle, let alone for every large Seattle hotel subject to the Ordinance, the cost of paying its workers the compensation required by the Ordinance would be so great that it had no real choice but to adopt or amend an ERISA plan.

Both of those declarations assert that paying the extra wages required by the Ordinance would have been more expensive for the hotels than amending their plans, while providing little or no supporting detail even as to that proposition. But, as indicated by the quotation above and explained further below, the Supreme Court and Ninth Circuit have made it clear that the fact that it would be less costly to adopt or amend an ERISA plan than to pay other forms of compensation does not, of itself, establish that a state statute is preempted. The declarations provide no dollar amounts, let alone any other data or information relevant to these hotels' decision-making. They provide no basis upon which the Court may plausibly infer that these two hotels, much less other hotels, would be *forced* to set aside all other balancing considerations, including an interest in the nationwide uniformity of their benefit plans. And, the disparity between the two declarations (in one case merely stating that it would cost more to pay additional compensation than to amend a plan and in the other vaguely stating that it would cost two to eight times more to pay the additional compensation) demonstrate that ERIC will be unable to make sufficient plausible allegations to support its ERISA preemption claim.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Thus, the Court should grant the City's motion to dismiss with prejudice. ERIC has not pleaded any plausible claim that Part 3 of the Ordinance would make impermissible "reference to" or have an impermissible "connection with" ERISA plans, and it has provided no reason for the Court to believe that a plausible claim could be asserted in an amended complaint. At the very least, ERIC's declarations fall woefully short of demonstrating that a public health ordinance enacted by the overwhelming majority of Seattleites is so coercive that the Court should summarily strike it down as preempted without any fact-finding. Even if the Court denies the City's motion to dismiss, it should deny summary judgment to ERIC or, in the alternative, defer ruling on that motion to allow the City to take discovery.

II. STANDARD OF REVIEW

Dismissal under Federal Rule of Civil Procedure 12(b)(6) "may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1093 (9th Cir. 2017) (citations omitted). "Absent facial plausibility, [p]laintiff's claim must be dismissed." *Hall v. BNSF Ry. Co.*, No. C13-2160-RSM, 2014 WL 4719007, at *1 (W.D. Wash. Sept. 22, 2014) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A dismissal with prejudice is appropriate because further amendment would be futile." *McClellon v. Capital One Bank, N.A.*, No. C18-909, 2018 WL 5240528, at *4 (W.D. Wash. Oct. 22, 2018) (citing *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011)).

Summary judgment is proper when the movant shows through materials in the record, including depositions, documents, affidavits, admissions, or interrogatory answers, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c)(1). "In deciding whether to grant summary judgment, 'the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Aloe Vera of Am., Inc. v. U.S.*, 699 F.3d 1153, 1165 (9th Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

(1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ….")). Moreover, "at the summary judgment stage, [courts] must draw all reasonable inferences in favor of the non-moving party and, where disputed issues of material fact exist, assume the version of the material facts asserted by the non-moving party to be correct." *Id.*

The legal arguments in sections III to IV(A)-(C) *infra* apply to both the City's motion to dismiss and ERIC's summary judgment motion, and they demonstrate why dismissal is warranted and ERIC is not entitled to summary judgment. The facts plead in the Complaint do not plausibly allege that Part 3 is preempted by ERISA; i.e., they do not constitute facts sufficient to state a claim under any ERISA test for preemption. *Kwan*, 854 F.3d at 1093. And, as discussed above and in greater detail below, (1) even if ERIC's declarations were considered at the pleading stage, its claims are still not plausible, and (2) the declarations demonstrate that ERIC cannot amend the Complaint so as to allege plausible claims. However, should the Court disagree and deny the City's motion entirely, ERIC's summary judgment motion should be denied outright because the evidence submitted in support thereof does not establish that the Ordinance is preempted, or, in the alternative, deferred in order to allow the City discovery, as discussed *infra* Section IV(D).

III. BACKGROUND: PART 3 OF THE SEATTLE ORDINANCE

The relevant facts as to the history and provisions of the Ordinance are explained in the City's motion to dismiss, which explanation is incorporated herein. Most important for purposes of this action, as the City explained in its motion, *see* Def.'s Mot. & Mem. to Dismiss Pl.'s Compl. ("MTD") at pp. 5-7,[1] Dkt. # 18, and elaborates on below, the main component of Part 3 of the Ordinance is a requirement that large hotel employers pay their workers additional compensation to allow them to buy healthcare for themselves and their families. Seattle Mun. Code ("SMC") §14.25.120(A) (2018). An employer can exempt itself from the compensation

[1] As used herein, "p. __" or "pp. __" refers to the original pagination of the document.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

requirement if it provides gold-level benefits through its benefit plan or participates in a Taft Hartley benefit plan. *See* MTD at pp. 5-7 for detailed discussion.

The purpose of Part 3 could not be clearer. It is to pay "additional compensation" so as to allow hotel employees "to improve access to medical care." The title of Part 3 is "Improving Access to Medical Care for Low Income Hotel Employees." The "Intent" of Part 3 states:

> It is the intent of Part 3 to *improve access to affordable family medical care* for hotel employees. In Washington's economy, hospitality industry employers are the least likely to offer health insurance to employees and their contributions are second to lowest. The average monthly cost to a hotel employee for family medical coverage through an employer-offered plan exceeds $500 per month, forcing nearly half of eligible employees to decline such plans. *Access to affordable medical care* is critical for hotel employees to care for themselves and their families. *Additional compensation reflecting hotel employees' anticipated family medical costs is necessary to improve access to medical care for low income hotel employees.*

SMC § 14.25.110 (emphases added).

IV. ARGUMENT

ERIC's argument that Part 3 of the Ordinance is pre-empted by ERISA is based largely on a misguided attempt to reverse the tide of decades-worth of Supreme Court and Ninth Circuit jurisprudence that has narrowed the scope of ERISA's preemption provision. *See* Pl.'s Opp'n to Def.'s Mot. to Dismiss & Pl.'s Mot. for Summ. J. ("ERIC Br.") at pp. 11-14, Dkt. # 19. As described at length in the City's motion to dismiss, the Supreme Court, beginning with its decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.* (*Travelers*), 514 U.S. 645 (1995), has rejected a literal reading of ERISA's "relate to" standard for preemption. As the Court explained, if "relate to" were read literally, "then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.'" *Id.* at 655 (alteration in original) (citation omitted). *See also GGRA*, 546 F.3d at 654 ("We read *Travelers* as narrowing the Court's interpretation of the scope of § 514(a)."). Instead, the Supreme Court adopted a series of workable standards to interpret the "relate to" provision consistently with the "objectives" of ERISA and with "'scope of the state law that

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Congress understood would survive.'" *Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A.* (*Dillingham*), 519 U.S. 316, 325 (1997) (*Dillingham*) (citation omitted). Specifically, a law will be preempted only if it (1) "has a connection with," or (2) makes "reference to" employee benefit plans. *Id.*. *See also* MTD at pp. 9-11.

Despite this clear authority, ERIC selectively quotes a statement from a recent Supreme Court opinion that characterized the "broad scope" of ERISA's preemption provision. ERIC Br. at p. 11 (quoting *Gobeille*, 136 S. Ct. at 943). But *Gobeille* again recognized that "'no sensible person'" would adopt a literal reading of ERISA's preemption clause and that "the need for workable standards has led the Court to reject 'uncritical literalism' in applying the clause." 136 S. Ct. at 943 (citation omitted). The Supreme Court reiterated its previously adopted standards, which narrow the scope of that provision. *Id.* Notably, the entire sentence on which ERIC relies explains that the Supreme Court's "formulations ensure that ERISA's express pre-emption clause receives the broad scope Congress intended *while avoiding the clauses' susceptibility to limitless application*." *Id.* (emphasis added).

The Ninth Circuit again reiterated, just two months ago, that the Supreme Court "narrowed ERISA's preemptive reach," and that "no sensible person" would adopt a literal reading of ERISA's preemption clause, as it would "risk[] snaring a host of state laws that did not target ERISA's field of federal concern." *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers* (*Glazing Health*), 903 F.3d 829, 846 (9th Cir. 2018) (citations omitted). The Ninth Circuit again applied the familiar "reference to" and "connection with" standards and explained that the Supreme Court has "incorporated general principles of preemption analysis," including "the presumption that a state law directed at an area of traditional state concern is not preempted." *Id.*

As explained below, Part 3 of the Ordinance is not preempted because the presumption against preemption applies, and because Part 3 neither makes an impermissible reference to, nor has an impermissible connection with, ERISA plans.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

A. The Unwavering Presumption Against Preemption Applies in This Case.

In cases such as this, the Supreme Court begins its ERISA preemption analysis with the presumption against preemption. *See* MTD at pp. 9, 11-12. The Supreme Court has emphasized, "[w]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *Travelers*, 514 U.S. at 654. Thus, "where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id*. at 655 (citation omitted).

The presumption applies in the ERISA context if a state law reflects the historic power of the states or is directed at an area of traditional state concern or regulation. *See, e.g.*, *Glazing Health*, 903 F.3d at 846. Courts, including the Supreme Court, have consistently recognized the regulation of matters of health and safety as a police power of the states.[2] In *GGRA*, a San Francisco ordinance sought to ensure that employers contributed sufficient amounts to pay for their employees' healthcare. *See* MTD at p. 12. In applying the presumption, the Ninth Circuit highlighted the ordinance's focus on "health care services to persons with low or moderate incomes" and the fact that "State and local governments have traditionally provided health care services to such persons." *GGRA*, 546 F.3d at 648. The Ordinance is a similar exercise of police powers.

The Supreme Court has also held that "States possess broad authority under the police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (quoting

---

[2] *See, e.g.*, *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (applying presumption to state law which imposed a tax on gross receipts for patient services at diagnostic and treatment centers because "the historic police powers of the State include the regulation of matters of health and safety"); *accord Operating Eng'rs Health & Welfare Tr. Funds v. JWJ Contracting Co.*, 135 F.3d 671, 677 (9th Cir. 1998) ("ERISA pre-emption must have limits when it enters areas traditionally left to state regulation—such as the state's . . . regulation of health . . . matters.").

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

DeCanas v. Bica, 424 U.S. 351, 356 (1976)). *See also RUI One Corp. v City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004) ("[t]he power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power"); *WSB Elec., Inc. v. Curry*, 88 F.3d 788, 791 (9th Cir. 1996) ("[i]t is well settled that wages are a subject of traditional state concern, and are not included in ERISA's definition of 'employee benefit plan.' Thus, regulation of wages per se is not within ERISA's coverage"). In keeping with this principle, this Court applied the presumption to a Seattle ordinance which increased the minimum wage because the regulation of wages "relates to a matter of local concern." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 97 F. Supp. 3d 1256, 1282 (W.D. Wash. 2015) (relying on *WSB Elec.*, 88 F.3d at 791)). *See also* MTD at p. 11 n.9.[3]

ERIC challenges the applicability of the presumption on two grounds: (1) there is purportedly no longer a presumption against preemption because "five Justices of the Supreme Court have rejected the principle"; and (2) even if there is a presumption, it does not apply here because Part 3 "target[s] ERISA plans and parties to them, which is the exclusive concern of ERISA." ERIC Br. at pp. 14-19. Both of ERIC's arguments fall short.

ERIC urges this Court to disregard the Supreme Court's cases applying the presumption in ERISA contexts (*see id.* at p. 15) despite the fact that the Supreme Court has never reversed its precedent or in any way rejected or minimized the role of the presumption in its ERISA preemption analysis. ERIC's attempt to portray "debate within the Supreme Court" with regard to the presumption[4] is based primarily on concurring opinions authored by justices no longer on the Court. *Id.* at p. 14 (citing *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014) (Scalia, J.,

---

[3] ERIC erroneously relies (ERIC Br. at p. 18 n.9) on language in Part 3 of the Ordinance providing that the additional compensation required of employers is "in addition to and will not be considered as wages paid for purposes of determining compliance with the hourly minimum wage and hourly minimum compensation requirements" required under Seattle law. *See* SMC § 14.25.120(A). But the fact that employers must comply with existing minimum wage requirements without counting the payments made under the Ordinance does not change the fundamental character of the requirement: to provide additional *compensation* to employees. This is, and remains, a traditional area of state concern.

[4] *See* ERIC Br. at p. 15 (citing *Bell v. Blue Cross of Blue Shield of Okla.*, 823 F.3d 1198, 1201 (8th Cir. 2016), *cert denied*, 137 S. Ct. 1812 (2017)).

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

concurring); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 21 (2013) (Kennedy, J., concurring)). Yet even if there were "debate" among sitting justices, the Supreme Court's *precedent* makes clear that the presumption applies in ERISA cases.

This was confirmed in *Gobeille*, the Supreme Court's most recent preemption case. Although *Gobeille* concluded that the presumption was inapplicable to the particular statute at issue, it did not reject or question the presumption. *Contra* ERIC Br. at p. 14. The Supreme Court merely concluded that the presumption did not apply because the specific state law sought to regulate "a key facet of plan administration"—reporting by ERISA plans. *Gobeille*, 136 S. Ct. at 946. Critically, the Court acknowledged the ongoing viability of the presumption, stating that "[t]he analysis may be different when applied to a state law, such as a tax on hospitals . . . the enforcement of which necessities incidental reporting by ERISA plans." *Id.* (citing *De Buono*, 520 U.S. 806). Simply put, the presumption is alive and well. Indeed, in light of the Supreme Court's clear precedent, the Ninth Circuit continues to apply the presumption in ERISA preemption cases—even after *Gobeille*.[5] *See, e.g.*, *Glazing Health*, 903 F.3d at 846, 848-49.

ERIC ultimately acknowledges, as it must, that the presumption still applies in ERISA cases, but then attempts to argue that it should not apply *here* based on an assertion that Part 3 does not target an area of traditional state concern. *See* ERIC Br. at pp. 16-19. Specifically, ERIC portrays Part 3 as "target[ing] ERISA plans and parties to them, which is the exclusive concern of ERISA." *Id.* at pp. 15-16. But as addressed in detail below, ERIC's fundamental premise is incorrect: the Ordinance imposes obligations exclusively upon *employers, not ERISA plans*. Despite ERIC's attempts to distort the intent section of the Ordinance, *see id.* at pp. 17-18, both the text of the Ordinance, and the express intent of the voters cited *infra* at Section III, are clear:

[5] *See also, e.g.*, *D.L. v. Aetna, Inc.*, No. 18-893, 2018 WL 3869322, at *3 (C.D. Cal. Aug. 10, 2018) ("The Supreme Court has held that ERISA preemption is subject to a presumption against federal preemption."); *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 15-2633, 2017 WL 539578, at *17 (D. Or. Feb. 9, 2017); *In re Anthem, Inc. Data Breach Litig.*, No. 15-2617, 2016 WL 3029783, at *45 (N.D. Cal. May 27, 2016) ("[T]he U.S. Supreme Court has repeatedly emphasized that there is a presumption against federal preemption of state laws.").

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

the obligation imposed on employers is not to provide *benefits*; it is to provide *compensation* to give low-income employees access to affordable medical care. *See* SMC §§ 14.25.110, 120.

Although the Ordinance was necessary, in part, because the hospitality industry failed to provide low-income employees with access to affordable health coverage, *see id.* § 14.25.110, the only fair characterization of the "target" of the Ordinance is the cost to *employees* of purchasing their own healthcare at affordable prices, which is achieved through a requirement that *employers* pay them additional compensation. And although employers can elect to provide affordable health coverage through ERISA plans as an alternative to paying the required compensation, *see id.* § 14.25.120(B), Part 3 of the Ordinance requires *nothing* of ERISA plans; an employer need only pay the compensation. Thus, because the regulation of public health and wages have long been recognized as areas of traditional state concern, *see supra* pp. 9-10, the presumption against preemption applies here.[6]

ERIC attempts to draw a contrast between Part 3 of the Ordinance and the debt collection ordinance at issue in *Glazing Health*, noting that Nevada had regulated debt collection practices of construction contractors "'since the 1930s.'" ERIC Br. at p. 16 (quoting *Glazing Health*, 903 F.3d at 848). ERIC claims that "Seattle has not long regulated on the subject matter" of Part 3. *Id.* at p. 17. Again, ERIC misses the mark. Seattle *has* long regulated the safety and health of its citizens and the wages paid by employers within the city.[7]

---

[6] ERIC's reliance (*see* ERIC Br. at p. 15 n.8, 18) on cases addressing a distinct preemption provision under the Federal Employee Benefits Act ("FEHBA") is misplaced. Unlike here, the relevant state laws in those cases squarely addressed matters of plan administration. *See Bell*, 823 F.3d at 1200 (state law regarding plans' rights to seek reimbursement from beneficiaries for benefits paid); *Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1095 (10th Cir. 2015) (same).

[7] *See, e.g.*, *Jahn v. City of Seattle*, 120 Wash. 403, 207 P. 667 (1922) (addressing City ordinances requiring contractors performing work for City to pay employees not less than wages paid by City to its employees); Resolution No. 3489 (amended Article XXIII of the City Charter of The City of Seattle and required contractors for the City of Seattle to pay their employees no less than the current rate of wages paid by the City) (passed by the City Council on January 4, 2012); SMC § 14.04 Fair Employment Practices (defines unfair employment practices within the City of Seattle and authorizes city agencies to prevent employment discrimination by private employers and labor organizations in the city and by the City of Seattle) (enacted in 1973); SMC § 14.16 Paid Sick Time and Paid Safe Time (amends existing ordinance originally issued in 2012 and requires employers to provide employees with paid leave for health and safety issues) (effective July 1, 2018); SMC § 14.19 Minimum Wage and Minimum Compensation Rates for Employees Performing Work in Seattle (requires minimum wages for overtime-exempt employees) (effective April 1, 2015); SMC § 14.20 Wage and Tip Compensation Requirements (requires payment for all money owed by reason of employment, including minimum wage, promised wage, overtime, rest breaks,

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

ERIC's attempt to distinguish *GGRA* is equally unpersuasive. The ordinance in *GGRA* required employers to make certain payments "'for the purpose of providing health care services for covered employees or reimbursing the cost of such services for its covered employees.'" *GGRA*, 546 F.3d. at 644 (citation omitted). ERIC argues that unlike the *GGRA* ordinance, Part 3 is not aimed at the provision of "health care services", *id.* at 648, but instead is "aimed at *the benefits* employers" provide, ERIC Br. at p. 19. But again, that is simply untrue. Like the ordinance in *GGRA*, which targeted "persons with low or moderate incomes," 546 F.3d at 648, Part 3 is aimed at a lack of access to healthcare experienced by historically underpaid employees in the hospitality industry. Part 3 seeks to bridge this gap by requiring that employers provide their employees with additional compensation to make healthcare more affordable for them.

Moreover, the Ordinance, taken as a whole, plainly exists to provide basic safeguards "to protect hotel employees from assault and injury on the job, to improve access to affordable healthcare, and to provide a minimum standard of job security for hotel employees." SMC § 14.25.010. *See also* MTD at p. 4. Only a small portion of the Ordinance (Part 3) is concerned with providing additional compensation so that employees may afford health care; most of it addresses protecting employees from assault and sexual harassment, protecting them from chemical hazards and other injuries, and providing them the opportunity to re-apply for work in the event of hotel ownership transfer. *Id.* That one subpart of Part 3 provides employers the *option* of avoiding the compensation obligation if they offer affordable healthcare through an ERISA plan does not change the fact that the Ordinance's "various components are . . . all of a piece regulating the" the health, safety, and wages of Seattle workers and residents. *Glazing Health*, 903 F.3d at 849 (taking a holistic view of Nevada's modifications to its vicarious

---

reimbursement and more) (effective April 1, 2015); SMC § 14.22 Secure Scheduling (requires large food services and retail establishments to provide a suite of scheduling protections, including a 10-hour rest period between closing and opening shifts for health and safety reasons) (effective July 1, 2017); Seattle, Wash., Ordinance 125,627 ("Domestic Workers Ordinance") (July 23, 2018) (SMC § 14.23 Domestic Workers - effective July 1, 2019) (establishes workplace protections for domestic workers, including minimum wages, meal periods and rest breaks, a day of rest for domestic workers who reside at the place of employment, and a Domestic Workers Standards Board to identify future protections).

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

liability statute where only two of the six amendments, reporting provisions imposed on ERISA plans, implicated ERISA plans).

B. The Ordinance Does Not Impermissibly "Reference" ERISA Plans.

ERIC argues that subsection B makes "mention" of or "allusion" to ERISA plans, ERIC Br. at p. 20, *see also id.* at p. 24, but the Ninth Circuit recently reaffirmed that the mere "mention [of] ERISA plans is not determinative of preemption." *Glazing Health*, 903 F.3d at 852. "In fact, '[t]he Supreme Court . . . has never found a statute to be preempted simply because its text included the word ERISA or explicitly mentioned a covered employee welfare benefit plan.'" *Id.* (alteration in original) (citation omitted). Rather, as explained in the City's motion to dismiss, a state law will be preempted as having an impermissible "reference to" ERISA plans only if "the existence of ERISA plans is essential to the law's operation" or if the state law "acts immediately and exclusively upon ERISA plans." *Dillingham*, 519 U.S. at 325. *Accord Gobeille*, 136 S. Ct. at 943.

Although ERIC pays lip service to these controlling standards, *see* ERIC Br. at p. 19 (quoting *Gobeille*), it quickly tries to escape them by suggesting that *Glazing Health* discarded them in favor of a far more preemption-expansive "some effect" standard. ERIC Br. at p. 19 (quoting *Glazing Health*, 903 F.3d at 852). *See also* ERIC Br. at pp. 21, 27, 33, 35, 36 (attempting to apply this supposed standard). The Ninth Circuit did no such thing in *Glazing Health*. Instead, in the course of rejecting the contention that the mere mention of or allusion to ERISA plans results in preemption, it stated that a statute is preempted "only if it 'mentions or alludes to ERISA plans, *and* has some effect on the referenced plans.'" 903 F.3d at 852 (citation omitted). The Ninth Circuit then went on to address what "effect" would meet the "reference to" requirements and made it clear that a statute impermissibly references ERISA plans only if it immediately and "exclusively" "acts upon" ERISA plans, or if ERISA plans are "essential" to the statute's "operation," *id.* at 852-54 (quoting *Gobeille*, 136 S. Ct. at 943). Thus, as indicated by its reiteration of the Supreme Court's most recent articulation of the "reference to" standard,

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Glazing Health cannot reasonably be interpreted as promulgating a general "some effect" standard to supplant the Supreme Court's more rigid standard. Additionally, *Glazing Health* explicitly relied on a prior Supreme Court decision that held that a state's general garnishment law was *not* pre-empted even though it "'obviously *affect[ed]* and involve[ed] [sic] ERISA plans.'" *Glazing Health*, 903 F.3d at 850 (alteration in original) (emphasis added) (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 833-34 (1988)).[8]

ERIC nonetheless argues that Part 3 "affects" ERISA plans because it "reach[es] in one way or another the 'terms and conditions of employee benefit plans.'" ERIC Br. at p. 21 (alteration in original) (quoting *Glazing Health*, 903 F.3d at 853). But again, ERIC ignores that this quote came within the context of the Ninth Circuit's discussion of whether the statute immediately and exclusively "acts upon" ERISA plans, and ERIC ignores *Glazing Health*'s conclusion that the statute at issue in that case did not do so because it merely regulated the debt collection practices of plan administrators. Like Part 3 of the Ordinance, the statute in *Glazing Health* did not impose any requirements on ERISA plans themselves, much less mandate any changes to the terms and conditions of plans. 903 F.3d at 853.

As further detailed below, ERIC makes no plausible argument that Part 3 of the Ordinance violates either of the two standards applied by the Supreme Court and the Ninth Circuit in evaluating whether statutes improperly "reference" ERISA plans.

1. Part 3 of the Ordinance Does Not Operate "Immediately and Exclusively" Upon ERISA Plans.

ERIC does not credibly argue that Part 3 operates "immediately and exclusively upon ERISA plans. It asserts that Part 3 "regulat[es] … the plans themselves," ERIC Br. at p. 24 (alteration in original) (citation omitted), but that is simply incorrect. Part 3 mandates *nothing* of ERISA plans. Instead, it imposes an obligation "immediately and exclusively" upon *employers* to pay additional compensation sufficient to allow employees to purchase *their own* health

[8] Reverting to a "some effect" standard would also run afoul of the same concerns that long ago lead the Supreme Court to reject a literal reading of the "relate to" language that Congress used in the statute. *See Travelers*, 514 U.S. at 655.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

insurance on the state healthcare exchange. SMC § 14.25.120(A). This obligation exists even if the employer has *no* ERISA plan; an employer need not adopt an ERISA plan and need not make any changes to its existing ERISA plan. *See, e.g.*, *GGRA*, 546 F.3d at 659 ("Where a law is fully functional even in the absence of a single ERISA plan, . . . it does not make an impermissible reference to ERISA plans."). Although an employer may elect to take advantage of an exception to this obligation if it has or adopts an ERISA plan that conforms to the provisions of subsection B, *see* SMC § 14.25.120(B), that is plainly not the *exclusive* means of satisfying the Ordinance. Thus, any suggestion that Part 3 operates "immediately and exclusively" upon ERISA plans would rob these words of any meaning. *See, e.g.*, Black's Law Dictionary (10th ed. 2014) (defining "exclusive" to mean "[l]imited to a particular person, group, entity, or thing"); *id.* (defining "immediate" to mean "[h]aving a direct impact; without an intervening agency").

Glazing Health, on which ERIC somehow heavily relies, flatly rejected the "conflation" of "regulations affecting ERISA plan administrators," which may be permissible, with "regulations of ERISA plans themselves." 903 F.3d at 849 (citing *Lane v. Goren*, 743 F.2d 1337, 1338-39 (9th Cir. 1984)). It went on to note that the law at issue in *Goren* was not preempted "because it regulated . . . *employers*, not the *plans* they administered." *Id.* at 849-50 (emphases added) (citing *Goren*, 743 F.2d at 1339-41). In applying the "reference to" test, *Glazing Health* found that the statute at issue was not preempted because it did not "act upon," "target," "regulat[e]," or "impose . . . obligation" on ERISA plans themselves, but instead imposed an obligation on employers that merely "indirectly *affects*" ERISA plans. 903 F.3d at 853. *See also id.* at 855 (distinguishing obligations placed on employers from obligations placed on plans). Part 3 of the City's Ordinance similarly imposes an obligation on employers that, at most, *may* indirectly affect ERISA plans.

ERIC disputes that the obligation is placed on *employers*, asserting that "subsection B makes express reference to the 'coverage' that the employer provides" and characterizing subsection B as "demanding" gold-level coverage. ERIC Br. at p. 24. But as already explained,

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

the obligation of Part 3 is squarely imposed on the *employer*, not any plan. And because subsection B is merely an optional exception by which an employer may elect to provide gold-level benefits through a plan instead of paying compensation under subsection A, subsection B cannot be characterized as "demanding" anything from an ERISA plan.

ERIC attempts to rely on generalized declarations from two hotel employers regarding the relative costs of complying with subsections A and B. *See, e.g.*, ERIC Br. at p. 21. These declarations, of course, may not be considered on the City's motion to dismiss. And as they might relate to ERIC's summary judgment motion, they are not relevant in considering the "reference to" prong of the ERISA preemption analysis. As further explained *infra* at 33-33, ERIC and the City seem to agree that analysis of "reference to" is a purely legal question. Thus, to the extent that these declarations might be relevant, it would be in the context of the alternative "connection with" preemption analysis, and they are addressed in detail below in that context. *See infra* at IV-C.

But even if the assertions in the declarations showed there was a difference in cost between paying compensation under subsection A of the Ordinance (wages to employees) and amending a plan under subsection B thereof, and even if this difference could be considered to "encourage[] . . . changes to the employer's ERISA plan," *see* ERIC Br. at p. 21, the fact remains that the obligations are placed on the *employer*. There is no credible way to characterize incentives placed on an employer as operating *immediately* on an ERISA plan. *See, e.g.*, *Emp. Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994) ("The economic effect of independent state requirements on employers' incentives in drafting ERISA plans should be distinguished from the legal effect of state commands regarding ERISA plans."). As previously explained, the Supreme Court has long distinguished between state laws that "*mandated* employee benefit structures" (which are preempted), and state laws that merely "*encouraged*"

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

certain benefit structures through economic incentives (which are *not* preempted). MTD at p. 15 (quoting *Dillingham*, 519 U.S. at 328-29). *See also id.* at pp. 15-16 (citing other cases).[9]

Finally, ERIC's last-ditch characterization of Part 3 as an ordinance that imposes "penalties" for failure to adopt required plan provisions, ERIC Br. at p. 26, simply disregards the actual Ordinance and the clear intent of the voters who enacted it. The Ordinance does not impose penalties. It does not require payments to the City if an employer fails to provide compensation sufficient to pay for gold-level benefits. Instead, the Ordinance requires employers to pay compensation to their *employees* so that the employees can afford to pay for their *own* healthcare. This the only fair characterization of Part 3. The payments to employees are no more penalties than payments by employers to employees under other minimum wage laws are penalties. The express stated intent of the voters further illustrates this. As SMC § 14.25.110 makes clear, because "access to affordable medical care is critical for hotel employees" and because most hotel employees simply cannot afford to participate in employer-offered plans, "[a]dditional compensation reflecting hotel employees' anticipated family medical costs is necessary to improve access to medical care for low income hotel employees." *Id.* ERISA preemption principles simply do not entitle ERIC and its members to avoid paying hotel workers the compensation that Seattle voters deemed necessary for them to afford medical care.

2. ERISA Plans Are Not "Essential" to the Operation of the Ordinance.

ERIC also attempts to rely on the "essential to" the operation "reference to" prong of the preemption test, arguing that Part 3's "operation hinges on the existence and, indeed, the content of large employers' ERISA Plans." ERIC Br. at p. 19. ERIC offers tortured descriptions of Part 3 in an attempt to portray subsections A and B as creating some sort of interlocking, single standard for compliance. *See id.* at pp. 19-25. For example, ERIC describes the requirement to pay additional compensation under subsection A as being "facially tied to the nonsatisfaction of

[9] Contrary to ERIC's contention, Seattle does not concede that "employers could save money by amending their plans instead of paying additional wages." ERIC Br. at p. 21. The portion of the City's Motion to Dismiss that ERIC cites merely made the *legal* point, as is appropriate on a Rule 12(b)(6) motion, that any such difference in cost is legally irrelevant. MTD at pp. 14-17.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

subsection B," *id.* at p. 20, and characterizes subsection B as "authorizing non-operation of the direct-payment requirement in subsection A," *id.* at p. 21. ERIC even claims that "whether subsection A applies . . . can be determined only after making the determination under subsection B regarding whether the employer provides" qualified health benefits, *id.* at p. 20.[10]

But subsection A imposes a stand-alone requirement: an employer "shall pay" additional compensation. SMC § 14.25.120(A). Although an employer may *elect* to rely on an exception allowed by subsection B (which provides that an employer "shall not be required to pay the additional wages or salary" if it provides qualified health benefits), an employer is not *required* to make such an election, nor is it required to even evaluate whether its plan meets the criteria for the exception. In all cases—including, for example, if an employer wishes to avoid scrutiny of its ERISA plan or to provide uniform nationwide benefits—an employer may simply pay the additional compensation required by subsection A. Thus, under any fair characterization, subsection B is an exception from, or "alternative" to, the compensation requirement in subsection A.[11]

Accordingly, the existence or non-existence of any ERISA plan is not "essential" to the Ordinance. *See, e.g.*, Black's Law Dictionary (10th ed. 2014) (defining "essential" to mean "of the utmost importance; basic and necessary"). As with the ordinance that was upheld by the Ninth Circuit in *GGRA*, the fact that a "covered employer may choose to adopt or change an ERISA plan in lieu of making the required" expenditures does not change the fact that "the [o]rdinance can have its full force and effect even if no employer in the [c]ity has an ERISA

[10] *See also* ERIC Br. at p. 25 ("Subsection A and B are not 'either /or' propositions"); *id.* (denying that subsections A and B are "alternative options").

[11] ERIC references a "Toolkit" prepared by the City to assist employers with compliance with the Ordinance. *See* ERIC Br. at p. 25 (citing page 10 of same, which cited page 9 of Toolkit). But the referenced page of the Toolkit merely provides an example of how subsection B would be applied to a particular employee. *See* City of Seattle, Hotel Emps. Health & Safety Initiative - SMC 14.25, *Toolkit for Calculating Additional Compensation Payments for Medical Care* at p. 9, http://www.seattle.gov/documents/departments/laborstandards/toolkit_071218.pdf (last visited Nov. 9, 2018). It does not in any way suggest that subsection B is anything other than an exception from, or alternative to, the compensation requirement in subsection A.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

plan" because employers "can discharge their obligation under the [o]rdinance simply by making their required health care expenditures." 546 F.3d at 656-57.

ERIC's reliance (*see* ERIC Br. at pp. 21-23) on *Greater Washington* does not change this outcome.[12] As ERIC notes, *Greater Washington* held that the ordinance at issue impermissibly "referenced" ERISA plans because the amount of workers' compensation benefits an employer was required to pay under that ordinance was "measured by reference to" the level of benefits the employer provided under its ERISA plan. 506 U.S. at 130. But the ordinance in *Greater Washington* is materially different from the Ordinance here. Specifically, the former imposed an obligation only on employers who provided health insurance through ERISA plans and required those employers to provide benefits through a worker's compensation plan "'equivalent to the existing health insurance coverage'" provided under the employer's existing ERISA plan. *Id.* at 127-28 (citation omitted).

In contrast, under Part 3 of the Seattle Ordinance, all employers—even those with no ERISA plans—must pay compensation in amounts that are determined by statutorily-defined factors having nothing to do with the level of benefits under any employer's ERISA plan. Specifically, the amount of additional compensation is calculated solely by reference to the cost of healthcare on the Washington Health Benefit Exchange. SMC § 14.24.120(A). *See also GGRA*, 546 F.3d at 658 (noting a "critical distinction" between the San Francisco ordinance and the ordinance in *Greater Washington* was the fact that "[t]he employer calculates its required payments based on the hours worked by its employees, rather than on the value or nature of the benefits available to ERISA plan participants").

[12] Notably, "[s]ince *Greater Washington*, the Supreme Court has narrowed ERISA's preemptive reach, as [the Ninth Circuit has] recognized." *Glazing Health*, 903 F.3d at 846 (citing *GGRA*, 546 F.3d at 654) ("We read *Travelers* as narrowing the Court's interpretation of the scope of § 514(a)."). *Compare Greater Washington*, 506 U.S. at 129-30 (applying "ordinary meaning" of "relate to" to "give[] effect to the 'deliberately expansive' language chosen by Congress") (citations omitted), *with Travelers*, 514 U.S. at 656 ("We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.").

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

ERIC cites language in *GGRA* distinguishing *Greater Washington* on an additional basis. Specifically, *GGRA* noted that the amount of an employer's payment obligation under the *GGRA* ordinance was "measured by reference to the *payments* provided by the employer to an ERISA plan" rather than by the "level of *benefits* provided by the ERISA plan." ERIC Br. at p. 23. But the Ninth Circuit undertook this analysis in *GGRA* because, unlike here, the employer's payment obligation to the city under the *GGRA* ordinance actually was measured, in part, by payments made to the employer's ERISA plan: as payments to the plan increased, payments to the city decreased. *See GGRA*, 546 F.3d at 645 ("[a]n employer [wa]s exempt from making payments to the [c]ity if it ma[de] health care expenditures" through an ERISA plan in the statutory amount and was "*partially exempt to the extent that it ma[de] lesser* expenditures" through an ERISA plan) (emphasis added). Thus, *GGRA* distinguished obligations by reference to employer *payments* (as were the case in *GGRA*) from obligations by reference to the level of *benefits* (as were held impermissible in *Greater Washington*).

Here, however, no analogous relationship exists in this case between the amount of an employer's compensation obligation and its benefit plan. An employer's obligation to pay compensation under subsection A is based solely on statutory factors; it does not decrease in proportion to contributions made to, or benefits paid under, an ERISA plan. That an employer may elect to rely on an *exception* from the Ordinance's compensation obligation if it provides qualified benefits through an ERISA plan does not change the fact that the amount of the employer's *obligation* is based on factors entirely unrelated to ERISA plans. *Greater Washington* simply did not involve such an arrangement.[13]

[13] ERIC seeks to rely on a supposed "policy" rationale from *Greater Washington*. However, that rationale was set forth in the D.C. Circuit's opinion, *Greater Wash. Bd. of Trade v. District of Columbia*, 948 F.2d 1317, 1325 (D.C. Cir. 1991), not in the Supreme Court's decision. Moreover, the rationale would not apply here. ERIC notes that the D.C. Circuit relied on the premise that the District of Columbia ordinance, by making the level of worker's compensation benefits contingent on the level of health plan benefits, "burdened" employers because it required employers to factor in the added cost of providing matching workers' compensation benefits when deciding whether to add health benefits under their ERISA plans. *See* ERIC Br. at p. 25 (citing 948 F.2d at 1325-26). But Part 3 does not impose any similar "burden" here: the amount of compensation owed under the Ordinance does not *increase* based on an employer's decision to increase benefits under any ERISA plan. Indeed, if anything, an employer is *exempted* from the compensation provision if it provides the equivalent of gold-level exchange benefits. Moreover, the Ninth Circuit has squarely rejected ERIC's related contention that a hypothetical

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Finally, even if, as ERIC erroneously contends, the existence of subsection B's *optional* exception meant that the obligation to pay compensation under subsection A was "contingent" on the "value or nature of benefits" offered under an ERISA plan (if one even exists), ERIC Br. at p. 23, Part 3 of the Ordinance still would not improperly "reference" ERISA plans because, for all the reasons asserted above, the existence, or non-existence, of ERISA plans is not "*essential*" to the operation of the Ordinance and the Ordinance does not "act[] immediately and exclusively" upon any ERISA plan. *Dillingham*, 519 U.S. at 325. Indeed, ERIC's "contingent" argument is precluded by *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 106-08 (1983), in which the Supreme Court held that a state disability law was not preempted where it gave employers the option of satisfying the law by including statutorily prescribed disability benefits within an existing multi-benefit ERISA plan or complying with requirements outside of an ERISA plan. In *Shaw*, it could be said, as ERIC says here, that an employer's obligation to provide separate disability benefits under that statue was "contingent" on the "value and nature" of disability benefits provided through the employer's ERISA plan. But the Supreme Court concluded that the state disability benefit law in *Shaw* was not preempted. It stated that "while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered [non-ERISA] plan and including the state-mandated benefits in its ERISA plan." *Id.* at 108.[14]

---

employer's decision to reduce benefits in response to its additional compensation requirement, ERIC Br. at pp. 25-26, has anything to do with the preemption analysis. *See, e.g.*, *Emp. Staffing Servs.*, 20 F.3d at 1042 (rejecting argument that if employers "have to buy workers' compensation insurance, they will have no reason to provide so rich an ERISA plan as they do now," explaining that "[t]he economic effect of independent state requirements on employers' incentives in drafting ERISA plans should be distinguished from the legal effect of state commands regarding ERISA plans.").

[14] As background, ERISA provides a limited exception from its coverage (and thus its preemption provision) for plans "maintained solely for the purpose of complying with applicable . . . disability insurance laws." 29 U.S.C. § 1003(b)(3). Thus, the ordinance in *Shaw*, by allowing employers to satisfy disability law through a single-purpose plan exempt from ERISA, gave employers the option of either making amendments to their existing ERISA plans or complying with the ordinance completely independent of their ERISA plans.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

3. Part 3 Does Not Impermissibly Reference Taft-Hartley Plans.

As explained in the City's motion to dismiss, *see* MTD at pp. 19-20, regulations applicable to Part 3 provide an additional exception from the compensation requirement for employers that make payments for healthcare coverage through collectively bargained plans maintained by employers and unions (i.e., Taft-Hartley Plans). *See* SHRR § 150-210(2)(b) (2018). Contrary to ERIC's contention however, ERIC Br. at p. 26, this regulation is not an exemption for Taft-Hartley *plans*. ERIC's related contention that Taft-Hartley *plans* are excepted from Part 3 while other ERISA plans are "subject to" Part 3, *id.*, continues to ignore that the Ordinance imposes no obligations on *any* ERISA plan. Instead, as with respect to subsection B of Part 3, this regulation merely gives *employers* the choice as to how to comply with the Ordinance (i.e., pay compensation or make payments to a Taft-Hartley plan). Accordingly, the regulation operates "immediately and exclusively" upon *employers*, not ERISA plans. Moreover, because "the [o]rdinance can have its full force and effect even if no employer in the [c]ity has" a Taft-Hartley plan, *see GGRA*, 546 F.3d at 657, the "existence" of such a plan is not "essential" to the Ordinance's operation.

ERIC relies on *Mackey*, which held that a state statutory provision impermissibly "referenced" ERISA plans where its sole purpose was to except ERISA plans from an otherwise generally applicable wage garnishment statute. 486 U.S. at 829-30. *See also* ERIC Br. at pp. 26-27. But as the Ninth Circuit recently noted, *Mackey* was based on an outdated, literal approach to ERISA's preemption provision. *See Glazing Health*, 903 F.3d at 846 (noting that *Mackey* was based on the premise that a "state statute's express reference to ERISA plans suffic[ed] to bring it within the federal law's pre-emptive reach") (alteration in original) (quoting *Mackey*, 486 U.S. at 830). But as *Glazing Health* went on to explain, the Supreme Court has since "narrowed ERISA's preemptive reach," and "a state law is no longer preempted simply because it makes literal 'reference to' an ERISA plan." *Id.* at 846-48. Instead, "it must both identify ERISA plans and 'act[] immediately and exclusively upon ERISA plans' or make 'the existence of ERISA

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

plans . . . essential to the law's operation.'" *Id.* at 847 (alteration in original) (quoting *Gobeille*, 136 S. Ct. at 943).

In any event, the statute at issue in *Mackey* actually did operate "immediately and exclusively" on ERISA plans: it barred the garnishment of "[f]unds or benefits of [an] . . . employee benefit plan or program subject to . . . [ERISA]." 486 U.S. at 828 (alterations in original) (citation omitted). But here, the regulation does not except Taft-Hartley plans from the Ordinance, nor could it, because Taft-Hartley plans, like other ERISA plans, are not subject to the Ordinance to begin with. Instead, the regulation merely is directed at *employers* and excepts those *employers* who make payments to Taft-Hartley plans from the *employers'* compensation obligation under Part 3.

ERIC next relies on an inapposite, out-of-circuit case to support its "reference to" argument. *See* ERIC Br. at p. 27 (citing *Pharm. Care Mgmt. Ass'n v. Gerhart*, 852 F.3d 722, 729 (8th Cir. 2017)). But *Gerhart* addressed a state law that undisputedly regulated the management and administration of plan benefits. 852 F.3d at 728-29 ("[t]he parties do not dispute that § 510B.8 regulates the manner by which [pharmacy benefit managers] manage and administer prescription drug benefits" for covered entities, which expressly included ERISA plans). In contrast, the Seattle Ordinance regulates neither ERISA plans nor the administration or management of ERISA plan benefits. It imposes a compensation obligation on employers that is entirely agnostic as to whether such employers even have ERISA plans. Part 3 does not exempt ERISA plans from obligations imposed by the Ordinance nor could it, as no obligations are imposed on plans. Again, it merely excepts certain employers from their compensation obligation if they make payments to Taft-Hartley plans.[15]

[15] ERIC's contention that "an employer now has an incentive to opt to terminate its existing non-Taft-Hartley plan and join a Taft-Hartley plan," ERIC Br. at p. 27, is implausible. For one thing, Taft-Hartley plans are collectively bargained between employers and unions; i.e., they may not be started or joined through employer fiat. But even if the regulation incentivizes employers and unions to collectively bargain for the creation of or inclusion in Taft-Hartley plans, any such incentive is legally irrelevant to the preemption analysis. *See supra* p. 10, MTD at p. 15-17 (explaining that statutes that merely provide incentives to establish or change ERISA plans are not preempted).

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Even assuming that an exemption for employers who make payments to Taft-Hartley plans somehow meant the exemption impermissibly "referenced" Taft-Hartley plans, ERIC defies logic in suggesting such an exemption would convert an employer's free-standing compensation obligation under Part 3 into an encroachment on ERISA plans.

In *Mackey*, on which ERIC again relies, the Supreme Court considered whether a separate state statute barring garnishment of ERISA welfare plan benefits was preempted by ERISA.[16] The general garnishment statute, however, was not preempted because it applied to ERISA plans and other entities alike. *See* 486 U.S. at 830-41. Because Part 3 of the Ordinance does not apply to plans at all, let alone exclusively to plans (by way of exempting plans or otherwise), *Mackey* would not dictate preemption of the Ordinance even if *Mackey* were literally still good law (but *see supra*).

C. The Ordinance Does Not Have an Impermissible "Connection with" ERISA Plans.

As explained in the City's motion to dismiss, Part 3 does not have a "connection with" ERISA plans. *See* MTD at pp. 11-17. To determine whether a state law has an impermissible "connection with" ERISA plans, courts "look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans." *Dillingham*, 519 U.S. at 325 (citation omitted). *See also Glazing Health*, 903 F.3d at 849 (same). In evaluating the scope of state laws that Congress understood would survive ERISA preemption, the Supreme Court and the Ninth Circuit have consistently relied on the presumption against preemption, which applies here. *See* MTD at pp. 11-12; IV-A, *supra*.

As previously explained, Congress's focus in enacting ERISA's preemption provision was state laws that "'govern[] . . . a central matter of plan administration' or 'interfere[] with nationally uniform plan administration.'" *Gobeille*, 136 S. Ct. at 943 (quoting *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001)). ERIC cannot credibly dispute that Part 3 has

[16] *See Mackey*, 486 U.S. at 829 ("The Georgia statute at issue here expressly refers to—indeed, solely applies to—ERISA employee benefit plans.").

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

nothing to do with plan reporting and recordkeeping, the traditional matters of plan "administration" that were the focus of Congressional concern. *See* MTD at pp. 13-14 (citing *Gobeille*, 136 S. Ct. at 945). ERIC attempts to argue that "the notice, recordkeeping, and reporting requirements associated with Part 3 are onerous," ERIC Br. at p. 31, but it entirely ignores that Part 3's reporting requirements have nothing to do with ERISA plans. The Ordinance requires only notice from employers to employees of the employees' rights under the Ordinance (which, again, need not involve anything having to do with an ERISA Plan). *See* SMC § 14.25.150(B)(1). Likewise, the Ordinance requires only that employers retain records regarding employee *hours* and *wages*, not ERISA plan benefits. *See id.* § 14.25.150(B)(2). Thus, in rejecting a similar argument in *GGRA*, the Ninth Circuit stated:

> The Association points to the burden entailed in keeping track of which workers perform qualifying work in San Francisco, keeping track of the hours those employees work and keeping track of the credit (if any) an employer should get for health care payments made to non-[c]ity entities. This burden is not enough, in itself, to make the payment obligation an ERISA plan. Many federal, state and local laws, such as income tax withholding, social security, and minimum wage laws, impose similar obligations on employer . . . .

546 F.3d at 650.

In contrast, ERISA requires covered *plans* to file annual reports containing financial and actuarial data to enable the Secretary of Labor to evaluate a plan's management and solvency. *See* 29 U.S.C. §§ 1023, 1024(a)(2)(B). Part 3 of the Ordianance does not seek to regulate the management or solvency of ERISA-covered plans. Nor does Part 3 collect information on plan finances and actuarial data. Thus, Part 3 is unlike the Vermont law in *Gobeille*, which, by requiring reporting on ERISA claims, interfered with ERISA plan recordkeeping and reporting requirements.

ERIC primarily argues that Part 3 is "connected with" ERISA plans because it "mandates benefit structures" and thus collides with ERISA's goal of ensuring a "'single uniform national scheme for the administration of ERISA plan.'" ERIC Br. at pp. 28-31 (quoting *Gobeille*, 136 S. Ct. at 947). But ERIC again ignores that Part 3 imposes an obligation only on employers

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

to pay compensation; it does not mandate the adoption of an ERISA plan or amendment of an ERISA plan's benefit structure. That an employer may choose to exempt itself from its compensation obligation by providing gold-level benefits through a benefit plan or participating in a Taft Hartley plan, *see* MTD at pp. 5-6, does not change the essence of the Ordinance. *See* MTD at pp. 14-17.[17]

In *GGRA*, the plaintiff restaurant association challenged San Francisco's requirement that all employers spend a certain amount on health care benefits for their employees, either through ERISA plans or by paying into a city-run non-ERISA health care plan. In *GGRA*, as here, the covered employers had options for complying with the ordinance at issue—including a payment option. The Ninth Circuit rejected the same "connection with" arguments that ERIC makes here:

> The [o]rdinance does not require any employer to adopt an ERISA plan or other health plan. Nor does it require any employer to provide specific benefits through an existing ERISA plan or other health plan. Any employer covered by the [o]rdinance may fully discharge its expenditure obligations by making the required level of employee health care expenditures, whether those expenditures are made in whole or in part to an ERISA plan, or in whole or in part to the [c]ity. The [o]rdinance thus preserves ERISA's "uniform regulatory regime." The [o]rdinance also has no effect on the "administrative practices of a benefit plan," unless an employer voluntarily elects to changes those practices.

546 F.3d at 655-56 (citations omitted).[18]

---

[17] ERIC further argues that the distinction between obligations imposed on an employer and obligations imposed on a plan or plan administrator is just a matter of "semantics." ERIC Br. at p. 32. However, as discussed in detail above, the Supreme Court and Ninth Circuit have made it clear that this distinction is critical to an analysis of whether a state law is preempted by ERISA. *See supra* 16-18. *See, e.g.*, *GGRA*, 546 F.3d at 656 (the "only influence" of the ordinance "is on the employer who, because of the [o]rdinance, may choose to make its required health care expenditures to an ERISA plan rather than the [c]ity"). This is hardly a matter of semantics.

[18] For these same reasons, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) and *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981) are unhelpful to ERIC. *Cf.* ERIC Br. at p. 30. In *Agsalud*, a Hawaii statute required "employers in that state to provide their employees with a comprehensive prepaid health care plan." 633 F.2d at 763. In distinguishing that case, the Ninth Circuit in *GGRA* noted that unlike in *Agsalud*, the San Francisco "[o]rdinance does not require any employer to adopt an ERISA plan . . . [n]or does it require any employer to provide specific benefits . . . ." 546 F.3d at 655. In *Fort Halifax*, a Maine statute required employers to provide a one-time severance payment to employees in the event of a plant closing. 482 U.S. at 12. Because severance payments might constitute an ERISA plan under certain circumstances, the Supreme Court, in the language quoted by ERIC, discussed, in *dicta*, why such a requirement might be preempted. (The Court ultimately held that the payments did not constitute an ERISA plan and were not preempted.) *Id.* at 9-14. In any event, the Ninth Circuit noted that the San Francisco ordinance [like the Ordinance here] "has no effect on 'the administrative practices of a benefit plan,' unless an employer voluntarily elects to change those practices." *GGRA*, 546 F.3d at 656 (citation omitted).

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Similarly, Part 3 does not require hotels to amend existing ERISA plans or establish new ERISA plans in order to comply with the Ordinance. Indeed, an employer need not have an ERISA plan at all. Covered hotels may fully discharge their obligations by paying additional wages to their employees. Just as in *GGRA*, if uniformity of plan terms and/or plan administration is an important enough consideration to a hotel, it may simply pay additional compensation to its Seattle employees and make no changes to any ERISA plan.

ERIC argues, however, that this choice is not a real choice because it will cost too much to pay the additional wages; i.e., Part 3 supposedly "coerce[s]" covered employers to alter or amend their ERISA plans. ERIC Br. at pp. 33-34. ERIC relies on *dicta* from *Travelers* and *Gobeille* suggesting that a state law "might" have an impermissible "connection with" an ERISA plan if it "produce[s] such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage." *Travelers*, 514 U.S. at 668; *Gobeille*, 136 S. Ct. at 943. But neither case relied on that standard. Indeed, ERIC cites no Supreme Court or Ninth Circuit case that actually struck down a statute as preempted on this basis.

Nevertheless, as the City explained in its motion to dismiss, nothing in the pleadings would support a facially plausible argument that Part 3 of the Ordinance imposes "acute" economic consequences that, in effect, "force" employers to modify their ERISA plans rather than pay their employees additional wages. MTD at pp. 14-16. There is nothing inherently coercive in Part 3, and the Complaint alleges only that an employer could save some amount of money by amending its plan instead of paying compensation. As previously explained, even if that were true, it would be legally irrelevant, as the Supreme Court and Ninth Circuit have made clear that a state may impose economic incentives on employers to make changes to ERISA plans without running afoul of ERISA's preemption provision. *See* MTD at pp. 15-17.

Even if the declarations submitted by ERIC in support of its motion for summary judgment were to be considered in the motion to dismiss analysis (which, of course they may not

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

be), ERIC's claim that Part 3 forces employers to amend their ERISA plans would not rise to the level of being facially plausible. The Declaration of Dawn Beaudin in Support of Motion for Summary Judgment ("Hyatt Declaration"), Dkt. # 22, merely states that "the cost [to Hyatt] of paying the additional compensation under Part 3 exceeds the additional cost of providing the equivalent of gold-level coverage." *Id.* ¶ 15. But again, the Supreme Court and the Ninth Circuit have made clear that neither the mere fact that a state law may increase costs for ERISA plans, nor the fact that it will cost less to comply with a law through use of an ERISA plan, will render the law preempted. *See, e.g.*, *GGRA*, 546 F.3d at 656-57 ("An employer may be influenced by the [o]rdinance to do so [adopt or change ERISA plan in lieu of expenditures] . . . [h]owever, as *Travelers* makes clear, such influence is entirely permissible."); *Dillingham*, 519 U.S. at 332-33. *See also* MTD at pp. 15-17.

Similarly, although the Declaration of Judith Fennimore in Support of Motion for Summary Judgment ("Marriott Declaration"), Dkt. # 21, provides slightly more detail than the Hyatt Declaration, the additional detail is itself vague and, even if true, would not nudge ERIC's coercion claim from "conceivable" to "plausible." The Marriott Declaration states that "Marriott determined, based on available facts and reasonable projections, that complying with Part 3 by way of Additional Wage Compliance would cost Marriott approximately two to eight times more than complying with Part 3 by way of Coverage Compliance." *Id.* ¶ 11. It is difficult to imagine what "reasonable projections" Marriott was relying upon that caused its estimate to range from approximately two to eight times, but unfortunately, Marriott and ERIC leave matters to the imagination: Marriott does not provide any actual numbers or costs.

In any event, the Marriott Declaration, even if taken as true, would merely demonstrate the legally irrelevant point that complying with the employer spending requirement is more expensive than coverage compliance. ERIC has not provided any basis to plausibly infer that Hyatt and Marriott, much less every hotel covered by the Ordinance, are compelled to amend their plans despite all other considerations. Put differently, ERIC has provided no allegations—

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

and no evidence—regarding how Hyatt, Marriott, or any other employer would compare the additional cost of paying compensation with all other interests weighing *against* making amendments to a plan, including interests in nationwide uniformity of plan benefits (i.e., not wanting an ERISA plan to be different for Seattle workers and those in other parts of the country).

Yet even if ERIC had plausibly alleged (in the case of the City's motion to dismiss) or submitted unrebutted and unrebuttable evidence (in the case of ERIC's motion for summary judgment) that one or two hotels concluded that the costs of paying compensation forced them to amend their ERISA plans, that still would not establish that the Ordinance has an impermissible connection with ERISA plans because it would not allege or demonstrate that the identical choice would and of necessity, had to be made, by all hotels in Seattle, whether ERIC members or not. *See, e.g.*, *Travelers*, 514 U.S. at 664 ("Although … there might be a point at which an exorbitant tax leaving consumers with a Hobson's choice would be treated as imposing a substantive mandate, no showing has been made here that the surcharges are so prohibitive as to force *all* health insurance consumers to contract with the Blues.") (emphasis added).[19]

Notably, ERIC cites no case that discusses specific quantifiable numbers—even as vague as "approximately two to eight times"—as supporting a claim of coercion. Indeed, as previously noted, in none of the cases cited by ERIC in its brief or its complaint to support its "coercion" argument (e.g., *Travelers*, *Gobeille*, and *GGRA*) was "coercion" relied on for the courts' holdings. Rather, the discussions of coercion were dicta. MTD at pp. 14-15; *GGRA*, 546 F.3d at 659-60.

[19] Indeed, ERIC, by its own admission, represents only large hotels that sponsor ERISA plans. Even if ERIC could provide to the Court facts sufficient to plausibly allege (and then later, to prove) that all of its member hotels in Seattle would be forced to amend those plans rather than pay the additional compensation required by the Ordinance, those facts would not demonstrate that for smaller hotels covered by the Ordinance, the decision-making considerations are the same. Small hotels, which do not have the resources of large hotels, likely spend less than large hotels on existing health plans, meaning they would need to spend comparatively more additional money than large hotels to amend their plans to take advantage of the exception in Subpart B. Thus, with respect to smaller or more local hotels, the cost of paying the Ordinance-mandated compensation may be less than or only a moderate amount more than amending their plans. The Ordinance cannot be preempted as applied only to ERIC's members; a state law is either preempted or it is not preempted.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

ERIC pulls snippets from *GGRA's* discussion of *Retail Industry Leaders Ass'n v. Fielder* (*Fielder*), 475 F.3d 180 (4th Cir. 2007), in support of its argument. ERIC Br. at pp. 33-34. However, neither *GGRA* nor *Fielder* supports ERIC's coercion argument. *Fielder* concerned a Maryland law that required "employers with 10,000 or more Maryland employees to spend at least 8% of their total payrolls on employees' health insurance costs or pay the amount of their spending falls short to the State of Maryland." *GGRA*, 546 F.3d at 659 (quoting *Fielder*, 475 F.3d at 183). Wal-Mart was the only employer affected by the law's minimum spending requirements. While the law, on its face, had two options, the Fourth Circuit held that "in practical fact, Wal-Mart had no choice." *Id.* The Fourth Circuit explained that while an employer "would gain from increasing the compensation it offers employees through improved retention and performance of present employees and the ability to attract more and better new employees . . . an employer would gain nothing in consideration of paying a greater sum of money to the State." *Fielder*, 475 F.3d at 193.

In *GGRA*, the Ninth Circuit concluded that "even under the reasoning of [*Fielder*], San Francisco's [o]rdinance is valid." 546 F.3d at 559. The Ninth Circuit stated that "[i]n contrast to the Maryland law, the San Francisco [o]rdinance provides tangible benefits to employees when their employers choose to pay the [c]ity rather than to establish or alter ERISA plans." *Id.* at 660. The same is even more true here, where an employer's alternative to amending its plan is not to makes payments to the City, but instead to make payments directly to its own employees. Thus, Part 3's compensation requirement provides obvious tangible benefits—among other things, employers can better attract and retain employees and will have a healthier workforce. Thus, because tangible benefits are clearly provided through the employer compensation requirement of Part 3, both *GGRA* and *Fielder* support the City's position that there is no "coercion".

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

D. The Court Can and Should Grant the City's Motion to Dismiss Without Leave to Amend; If It Denies that Motion, and Does Not Outright Deny ERIC's Summary Judgment Motion, It Should Deny or Defer Ruling on That Motion Until the City is Permitted to Take Discovery.

As discussed above, before the Court are two motions: the City's motion to dismiss and ERIC's motion for summary judgment. ERIC is correct that the "issues for determining if ERISA preempts Part 3 are largely legal." ERIC Br. at p. 35. But as demonstrated in the City's motion and herein, ERIC has failed to plausibly allege that Part 3 of the Ordinance has an impermissible "reference to" or "connection with" ERISA. Further, although ERIC improperly relies on declarations in its opposition, even if the contents thereof were pleaded in the Complaint, they would not plausibly show "coercion." Thus, the Court can and should grant the City's motion. And it should do so with prejudice. As explained above, *supra* at 30, ERIC cannot plausibly allege even that every ERIC-member hotel covered by the Ordinance, let alone every non-ERIC member covered hotel, would be forced to adopt or amend an ERISA plan when faced with paying the additional compensation to its employees that the Ordinance requires.

But even if the Court denies the City's motion to dismiss, it should either deny ERIC's summary judgment motion outright, or it should deny or defer that motion to give the City the opportunity to conduct discovery.

"'The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Simons v. Cenveo Corp.*, No. C15-1598-JCC, 2017 WL 1079917, at *2 (W.D. Wash. Mar. 22, 2017) (quoting Fed. R. Civ. P. 56(a)). As an initial matter, ERIC argues that there are no genuine disputes as to material facts under the "reference to" inquiry. ERIC Br. at pp. 35-36. The City agrees. As explained above, however, the Ordinance does not make an impermissible "reference to" ERISA plans because the existence of ERISA plans is neither essential to the law's operation nor does it act "immediately and exclusively upon ERISA plans." *Dillingham*, 51 U.S. at 325. *Accord Gobeille*, 136 S. Ct. at 943. *See supra* at IV-B. Thus, as to the "reference

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

to" standard, although there are no genuine disputes of fact, ERIC is simply not entitled to judgment as a matter of law.

With respect to the "connection with" test, as explained above, ERIC has failed to establish that there are no genuine disputes as to material facts. Under the "connection with" test, a statute "might have an impermissible connection with ERISA plans if 'acute, albeit indirect economic effects' of the state law 'force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." *Gobeille*, 136 S. Ct. at 943 (citation omitted). The case law is clear that higher costs alone do not meet that standard. *See supra* at 29. But, as discussed above, the declarations ERIC relies on do just that; i.e., they indicate only that complying with the employer spending requirement *may* be more expensive for *some* large hotel employers.

ERIC contends that there can be no dispute as to coercion when "ERIC members already have changed their plans to comply with Part 3." ERIC Br. at p. 36. But ERIC reads too much into two employers' decisions to amend their plans. ERIC has failed to show that the decision to amend was the only realistic option these employers had, let alone that the Ordinance by its nature would force any other hotel to make that choice. Thus, under the "connection with" test, a genuine issue of material fact remains as to whether Part 3 coerces large hotel employers in Seattle to amend their ERISA plans. The Court should therefore deny ERIC's motion.

Alternatively, even if the declarations, *if unrebutted*, could be sufficient to support an inference that *all* affected employers will be forced by the Ordinance to adopt or amend ERISA plans, the City requires discovery to test the "facts and reasonable projections" upon which the declarations are purportedly based. *See, e.g.*, Marriott Decl. ¶ 11. As noted above, neither declaration provides any detail regarding the actual costs of complying with the compensation requirement, the actual costs of amending Marriott's and Hyatt's ERISA plans, and how those costs compare to the value of all other considerations. Discovery would be required regarding those further details. *See* Declaration of Jeffrey Lewis in Support of Defendant's Alternative

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Request ¶¶ 7-8, filed herewith. And the City needs to take discovery as to the facts with regard to other hotels. *Id*. Thus, at the very least, if the Court denies the City's motion and does not outright deny ERIC's summary judgment motion, the City respectfully requests that the Court defer decision on ERIC's motion to allow the City to engage in relevant discovery. *See* Fed. R. Civ. P. 56(d).

V. CONCLUSION

As explained above, Seattle's multi-faceted ordinance protecting the health and safety of hotel workers, which includes an employer payment obligation, neither makes reference to nor has a connection with ERISA plans under the standards set forth by the Supreme Court and Ninth Circuit for evaluating ERISA preemption. The City's motion to dismiss should be granted, and as explained above, that dismissal should be without leave to amend because ERIC cannot plausibly allege facts that would support a preemption argument. If, however, the Court denies the City's motion to dismiss, then for all of the reasons stated above, the Court should deny ERIC's summary judgment motion outright or deny or defer it to allow the City to engage in discovery.

DATED this 9th day of November, 2018.

By *s/ Erin M. Riley*
Erin M. Riley, WSBA #30401
eriley@kellerrohrback.com

By *s/ Rachel E. Morowitz*
Rachel E. Morowitz, WSBA #53771
rmorowitz@kellerrohrback.com

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Tel.: 206-623-1900
Fax: 206-623-3384

By *s/ Jeffrey Lewis*
Jeffrey Lewis, *admitted pro hac vice*
jlewis@kellerrohrback.com
KELLER ROHRBACK L.L.P.
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
Tel.: 510-463-3900
Fax: 510-463-3901

Attorneys for Defendant City of Seattle

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2018, I electronically filed DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record.

DATED this 9th day of November, 2018.

By *s/ Erin M. Riley*

Erin M. Riley, WSBA #30401
eriley@kellerrohrback.com
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Tel.: (206) 623-1900
Fax: (206) 623-3384