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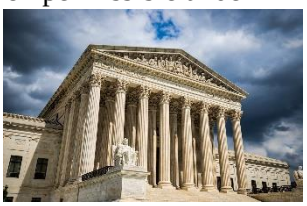
Federal Law Prohibits State Single Payer Initiatives From Disrupting Employer-Sponsored Health Benefits

The U.S. Congress has been unequivocal that self-insured, employer-sponsored plans – many of which span multiple states or are even nation-wide – will be regulated at the federal level, not by the states. The Employee Retirement Income Security Act of 1974 (ERISA) preempts any state laws that "refer or relate to" employer-sponsored health plans or self-insured health plans. This preemption is applicable when a state law would impact ERISA plans either administratively or financially. According to the Kaiser Family Foundation's 2020 Employer Health Benefits Survey[1], 67 percent of covered workers were enrolled in employer plans in 2020. ERISA limits states' abilities to infringe on employer benefit plans—and employer funds cannot simply be diverted to pay for a single-payer system. The single-payer proposals in states such as Oregon, Vermont, New York, New Mexico and most recently Illinois, would be funded via a payroll tax, and so far, this kind of proposal has not been successfully implemented. The significant taxes necessary to finance single-payer proposals have a high potential to cause employers to drop health insurance benefits, as employer funds would be used to finance a separate health insurance program for employees in those states.

In addition to imposing a financial burden, a single-payer system could add a layer of administrative complexity for multi-state employers that provide benefits to employees who relocate, work in different states, or are contractually hired. One of the original intentions of ERISA was to ensure that a company's employees could have access to the same set of benefits regardless of where they lived, worked, or received medical care. Introducing a single-payer system in one state would cause citizens of that state to be subject to different health benefit requirements, and varying premiums or tax assessments, ultimately eroding the national uniformity guaranteed to employers through ERISA. Such an approach would also force self-insured employers to abide by an arbitrary patchwork of inconsistent state or local tracking and reporting requirements – which is explicitly preempted under ERISA, as affirmed by the U.S. Supreme Court in *Gobeille v. Liberty Mutual. 577 U.S.* (2016) and most recently in *Rutledge v. Pharmaceutical Care Management Association. 18-540 U.S.* (2020). Whether or not this burden would directly fall on the carrier, or the employer, is unclear. Either approach could require added personnel, jeopardize patient privacy, and give rise to successful ERISA preemption challenges.

The New York Assembly and Senate proposed legislation testing the extent of insurance regulation permissible under ERISA in the 2018 and 2021 legislative sessions, and the state's Legislative Branch has a historical interest in single payer programs. In the early 1990's, New York implemented a health law which required hospitals to collect surcharges from patients covered by commercial insurers and select HMOs, but not from patients insured by Blue Cross/Blue Shield plans. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers* (514 U.S. (1995)), The U.S. Supreme Court ruled the New York state law was not preempted by ERISA because the surcharges only imposed an "*indirect economic influence*" on administrators. According to the Court, such an indirect economic influence "*does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself*," nor does it "*preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one*." Insurers could still offer the same health plan to employers in different states; the law only affects the cost of the plan for the New York employers. In *Travelers'* majority opinion, the Supreme Court found imposing exorbitant taxes or fees leaves employers within the state with limited choices and could be preempted by ERISA. The Supreme Court explained "*a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers*."



1 Kaiser Family Foundation, 2020 Employer Health Benefits Survey, https://www.kff.org/health-costs/report/2020-employer-health-benefits-survey/ (October 8, 2020)

Even the absence of mandated health coverage enables the possibility of an unconscionable tax becoming a state mandate. This would leave many employers struggling to offer comprehensive and competitive employee benefits. The New York Single-Payer Proposal attempts to go significantly further than the assessment on insurance carriers that was litigated in *Travelers*. The proposal significantly relies on payroll and nonpayroll taxes to finance the program. It is estimated to cost $139.1 billion in 2022 and $210.1 billion in 2031.[2] Because it could be prohibitively expensive for employers to both pay for health coverage for its employees and pay the payroll tax (estimated to be between six and eighteen percent), it's likely New York employers will no longer sponsor their own group health plans as a result. Arguably, this construct imposes a more direct burden on ERISA plans.

Vermont's legislature attempted to implement a single-payer system in 2011. State officials pursued a policy similar to recent attempts of the New York legislature to create a public system without mandating an end to self-insured employer-sponsored plans. According to an article[3] published by the Cornell Policy Review, Vermont's single-payer plan would have been financed through an 11.5 percent payroll tax, and income-based contributions for residents. The details of who would pay and at what level were never fully hashed out.

Employers would have been subject to the payroll tax regardless of what benefits they offered. Due to the fact their employees would have been eligible for the single-payer plan, and employers/employees would have had to pay the full freight of financing this plan without regard to their enrollment status, it is highly likely that those in large-group employer-sponsored plans would have had little choice but to migrate to the single-payer plan as their primary source of coverage – which would have given rise to ERISA preemption of the law.

New Mexico's legislature in 2019 considered implementation of a single payer system titled "*The New Mexico Health Security Plan (HSP)*." In 2019, the House Appropriations and Finance Committee and the Senate Finance Committee made appropriations to the Legislative Finance Committee for a fiscal analysis of the program. The HSP preliminary study estimated implementation would cost $50 billion to implement in the first five years, and still be underfunded by $7 billion[3]. The study confirms the program would burden those that still offer self-insured health plans to employees, mandating employers contribute at a minimum eight percent of their payroll to the program.

Similar to Vermont's single payer proposal, New Mexico employers would be obligated to provide the majority of funding to the HSP, which would strain their ability to continue current benefit offerings. Although the ultimate impact on employers depends upon implementation details, the HSP and its high costs will inevitably cause employers to drop their self-insured health plans and instead participate in the Health Security Plan - likely meaning the law would be preempted for infringing on ERISA's guarantee of national uniformity.

Although the New Mexico single-payer system may give the option for an employee to stay on their existing plan, the new financial burden to finance this health care system as well as the likelihood that national employers would have to structure different benefit offerings for employees in New Mexico, all point to a serious risk that such a system would be illegal under federal law.

In conclusion, even if employers are not required to directly purchase public coverage, imposing a new payroll tax on employers inevitably will alter existing ERISA plans, raising the likelihood of preemption. Whether a single-payer payroll tax would be preempted by ERISA has not yet been adjudicated in a court of law, but existing precedents make clear that state regulations related or connected to ERISA plans are unlikely to withstand challenges.

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2 RAND Corporation, An Assessment of the New York Health Act: A Single-Payer Option for New York State, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2400/RR2424/RAND_RR2424.pdf (2018)

3 Joe Vervalin, The Rise and Fall of Vermont's Single Payer Plan, http://www.cornellpolicyreview.com/rise-fall-vermonts-single-payer-plan (July 13, 2017)

3 KNG Health Consulting, LLC, Fiscal Analysis of New Mexico's Health Security Plan: Preliminary Report, https://www.knghealth.com/kngwp/wp-content/uploads/2020/05/KNG-Health-Fiscal-Analysis-of-HSP-Preliminary-Report-v1-05222020.pdf (May 22, 2020)