SCHOOL OF PUBLIC HEALTH AND HEALTH SERVICES
CENTER FOR HEALTH SERVICES RESEARCH & POLICY

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Jonathan Parker
National Director
SEIU, Americans for Health Care
1313 L St., NW
Washington, DC 20005

Dear Mr. Parker:

This is in response to your request for me to review the provisions of the Maryland Fair Share Health Care Fund Act ("the Maryland Act"), which was adopted by the Maryland Legislature in the 2005 Session, to determine whether its provisions imposing an assessment on certain employers who do not spend a specified percentage of total wages on "health insurance costs" are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). Although no court has directly addressed this issue, for the reasons described below, I have concluded that ERISA does not preempt the Maryland Fair Share Health Care Fund Act.

Overview of Current ERISA Preemption Jurisprudence

In the more than thirty years since the Federal law was passed, no issue of statutory interpretation under ERISA has so occupied the attention of the U.S. Supreme Court as the interrelationship of state laws and ERISA through ERISA's preemption clause. The Court has heard nearly twenty-five cases on this topic alone during this period.

It is fair to say that until 1995, the Supreme Court took a very narrow view of the extent to which state laws could survive an ERISA preemption challenge. Since then, however, beginning with the Court's 1995 watershed decision, *New York State Conference of Blue Cross &Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) ("*Travelers*"), the Court has revisited, redefined and broadened its historical view of two critical components of the ERISA preemption test: whether a state law "relates to" an ERISA plan and whether a state law is a "law regulating insurance" that should be saved from preemption under ERISA's so-called "savings clause." For purposes of analyzing the Maryland Fair Share Health Care Fund Act, however, the Court's new "relates to" interpretation is most relevant.

The effect of the Court's shifting view of the relative relationship between state laws and ERISA's preemption provisions is to give states considerably more latitude in regulating matters that may affect ERISA covered-employee benefit plans, while preventing in most instances direct state regulation of the plans themselves. It is in this context that one must examine the Maryland Fair Share Health Care Act to determine whether its provisions can withstand an ERISA preemption challenge.

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What Does the Maryland Law Require?

The Maryland Fair Share Health Care Fund Act requires employers, beginning January 1, 2007, to report to the Maryland Department of Labor, Licensing and Regulation (DLLR) the number of its employees and the amount and percentage of payroll spent by the employer in the year preceding the previous calendar year. In addition, the employer must report the amount spent by the employer for the same period on "health insurance costs" in the state. Non-profit employers that do not spend at least 6% of total wages and for-profit employers that do not spend at least 8% of total wages during the same period are required to pay the Fair Share Health Care Fund an assessment equal to the difference between the amount spent and the applicable percentage. "Health insurance costs" include any "payments for medical care, prescription drugs, vision care, medical savings accounts, and any other costs to provide health benefits" as those payments and costs are defined in Section 213(d) of the Internal Revenue Code.

What Criteria Is Used for Determining Whether A State Law Is Preempted by ERISA?

The general statutory framework under ERISA for deciding whether a state law will be preempted can be simply stated:

1. Does the challenged law "relate to" an ERISA plan (regardless of whether the plan is insured or self-insured)?
2. If so, does the challenged law fall into one of the statutory exceptions (state insurance, banking, and securities laws, as well as generally applicable criminal laws) and therefore, within the ambit of the "savings" clause?
3. Is the "saved" state insurance law, nevertheless, preempted because it violates the "deemer" clause?

For purposes of analyzing whether the Maryland Fair Share Health Care Fund Act is preempted, the relevant question is whether this law "relates to" an ERISA plan. If the answer is no, then the remaining questions asked above are irrelevant.

Section 514(a) of ERISA provides that ERISA will "... supersede any and all state laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 4(a) and not exempt under section 4(b) (emphasis added)."[1] As previously noted, the early Supreme Court cases interpreting the "relate to" clause of ERISA took a very expansive view of whether a state law related to an ERISA plan. Some argued that, in effect, the Court assumed

[1] 29 U.S.C. §1144(a) – (b).

that any state law or regulation that had an impact on an ERISA plan would be preempted. However, that is not the framework for analysis that the Court has used since 1995.

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) ("*Travelers*"), the Court examined a New York statute that required hospitals to collect surcharges on hospital bills from patients or payers on their behalf (only Empire Blue Cross Blue Shield was exempt from these surcharges). The revenue from the surcharges was used to subsidize the state's uncompensated care programs. The New York statute was challenged by commercial insurers and health maintenance organizations (HMOs) who argued that, with respect to their covered enrollees in ERISA plans, the surcharges were taxes imposed on ERISA plans and thus preempted by ERISA.

The Supreme Court disagreed, holding, among other things, that even if the surcharges had an indirect economic influence on ERISA plans, they were not preempted by ERISA because they did not "relate to" employee benefit plans. 514 U.S. at 649. Adopting the traditional presumption that federal law (ERISA) should not preempt state laws unless Congress clearly intended it to do so (514 U.S. at 654-55), the Court refused to overturn the New York law, since it did not "bind plan administrators to any particular choice" or "preclude uniform administrative practice or the provision of a uniform interstate benefit package, if a plan wishes to provide one. It simply bears on the **cost of benefits** and the relative costs of competing insurance to provide them [emphasis added]." 514 U.S. at 659. Moreover, the Court recognized that although the surcharges were meant to increase the costs of health insurance and health care for some of the HMOs, they did not interfere with the choices that ERISA plans make for benefit coverage. 514 U.S. at 654.

Finally, Justice Souter, writing for a unanimous Court, described the *Travelers'* decision as follows:

> ...we do not hold today that ERISA pre-empts only direct regulation of ERISA plans, nor could we do that with fidelity to the views expressed in our prior opinions on the matter ... (citations omitted). We acknowledge that a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers, and that such a state law might indeed be pre-empted under § 514...."

In a subsequent case, the Supreme Court expanded on this more narrow view of when ERISA preemption should nullify state law. For instance, in *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316 (1997), a unanimous Court reinforced the

presumption against preemption articulated in *Travelers*. 519 U.S. at 331. *Dillingham* involved the enforcement of California's prevailing wage law that allowed employers to pay a lower wage to employees who were participating in a state-approved apprenticeship program. Employers whose employees were enrolled in non-state approved apprenticeship programs were required to pay prevailing wages, not the lower wage. Among other things, the state law was challenged as preempted by ERISA, since the contractors argued that the California prevailing wage law "related to" an ERISA covered plan.

However, the Court rejected that argument since to be a state-approved apprenticeship program, the apprenticeship program did not need to be an ERISA plan. So in *Dillingham*, the Court reaffirmed that a state law only "relates to" an ERISA plan if it refers to or has a significant connection with an ERISA plan. 519 U.S. at 324. For a state law to meet this requirement, the existence of an ERISA plan is essential to the law's operation. 519 U.S. at 325.

As the *Dillingham* Court concluded, if the state law merely "alters the incentives" which exist for an ERISA plan, but "does not dictate the choices," then the law is not sufficiently connected with an ERISA plan to trigger preemption. 519 U.S. at 333.

Does the Maryland Fair Share Health Care Fund Act Violate ERISA's Preemption Provisions?

Based on existing current Supreme Court precedent, it cannot be reasonably argued that the Maryland Act is preempted by ERISA.

The Maryland Act imposes an assessment on employers based on the extent to which their health care expenditures for their employees as a percentage of their total wages for a measuring period fall below a specified percentage. This is a regulation on employers, not ERISA plans.

Moreover, the Maryland Act does not "relate to" ERISA-covered plans. It does not require employers to establish ERISA plans; it only requires employer to spend a certain amount of their payroll on health-related expenditures. Under the structure of the law, an employer may choose to spend no percent of its payroll on health expenditures for its employees. If an employer chooses that route, it simply pays the applicable assessment to the state's DLLR.

If an employer chooses to meet the applicable expenditure target, for instance, by establishing a series of on-site medical clinics where its employees can receive care or by hiring a nurse on an ad hoc basis to provide periodic immunizations for employees and their families, the employer may do so and those costs count toward the expenditure target. The Act permits any expenditures for health care costs that meet the Internal Revenue Service's definition of medical expenses to be counted toward this expenditure level.

If an employer subject to the law chooses to meet the expenditure level through the establishment or maintenance of an ERISA plan, the employer is free to do so. The employer

may design its plan to cover as many or as few benefits as it wishes, as many or as few employees as it chooses, and using whatever financing and employer-employee cost-sharing formula it chooses to adopt. Clearly the Maryland Fair Share Health Care Fund Act does not in any way constrain an employer's plan design choices.

Thus the Maryland Fair Share Health Care Fund Act cannot be said to require any employer to establish an ERISA plan to comply. Under the analysis used by a unanimous Supreme Court in *Dillingham*, the Maryland law would not be preempted. Nor can it be said that the Maryland Act binds plan administrators to any particular choice or prevents uniform benefit administration or plan design for a covered employer who operates in many states. Under the precedent established by a unanimous Supreme Court in *Travelers*, the Maryland Act would not be preempted either.

Based on existing current Supreme Court precedent, therefore, it cannot be reasonably argued that the Maryland Fair Share Health Care Fund Act is preempted by ERISA.

If I can be of any further assistance, please let me know.

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