January 9, 2006

The Honorable Michael E. Busch
Speaker of the House
101 State House
Annapolis, Maryland 21401-1991

Dear Speaker Busch:

You have asked for our advice concerning claims that the "Fair Share Health Care Fund Act," ("the Fair Share Act"), which passed the General Assembly as Senate Bill 790 and House Bill 1284 of 2005 and was vetoed by the Governor, is preempted by the federal Employee Retirement Income Security Act of 1974 ("ERISA"). It is my view that the Fair Share Act is not preempted.

The Fair Share Act creates the Fair Share Health Care Fund ("the Fund") for the purpose of supporting the operations of the Maryland Medical Assistance Program ("Medicaid"). The Fund is supported by a health care payroll assessment on large employers who do not spend at least a designated percentage of their payroll costs on health insurance costs. Specifically, an employer with more than 10,000 employees in the State is to be assessed the difference between 8% of their payroll costs (6% for non-profit entities) and the amount spent on health care insurance costs, if the latter amount is lower. In making this calculation, the employer may exclude from payroll amounts paid to any employee in excess of the median household income in the State and wages paid to employees who are enrolled in or eligible for Medicare. "Health insurance costs" includes not only any amounts paid to provide health insurance, but also any amounts paid to provide health care including direct payment. The term includes payments for medical care, prescription drugs, vision care, medical savings accounts, and any other costs to provide health benefits as defined under § 213(d) of the IRS Code. Under that section, medical care is broadly defined to include amounts paid for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure of function of the body, as well as transportation for medical care, qualified long-term care services and insurance. 26 U.S.C. § 213(d).

The Fiscal Note reflects that there are three employers in the State with more than 10,000 employees: Giant Food, Wal-Mart, and Johns Hopkins University. Of the three, only Wal-Mart has health insurance costs low enough to be subject to the payroll assessment. The Fiscal Note reflects claims by states that many Wal-Mart employees end up on public health programs such as Medicaid. Specifically, a Georgia survey found more than 10,000 children of Wal-Mart employees on Medicaid there, while a North Carolina hospital reported that 31% of Wal-Mart employees treated there were

on Medicaid. Advocates of a California fair share bill argued that Wal-Mart employees cost the State $32 million annually in Medicaid costs.[1]

Congress enacted ERISA to "protect ... the interests of participants in employee benefit plans and their beneficiaries" by setting out substantive regulatory requirements for employee benefit plans and to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U. S. C. §1001(b); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S.Ct. 2488, 2495 (2004). ERISA imposes a variety of requirements on employee welfare benefit plans with respect to such matters as reporting, disclosure, and fiduciary responsibility. It does not regulate the terms of employee welfare benefit plans, yet it broadly preempts regulation thereof by State or local government. Specifically, ERISA provides that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

The Supreme Court has held that a state law "relates to" an ERISA plan "if it has a connection with or reference to such a plan." *Egelhoff v. Egelhoff,* 532 U.S. 141, 147 (2001). A law has reference to a plan if it acts immediately and exclusively upon ERISA plans, or where the existence of ERISA plans is essential to the law's operation. *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 325 (1997). The Fair Share Act does not specifically refer to employee welfare benefit plans. Although it uses the term "health insurance costs," the definition of that term makes clear that it is not limited to insurance and similar employee welfare benefit plans, but includes payments made for health services outside the structure of a plan as well. Such payments, while they benefit employees, are not "employee welfare benefit plans." ERISA's preemption provisions apply only to the latter, and not to the former. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8, 12-13 (1987). Moreover, assessments under the Fair Share Act are not made against plans, but against employers, and are based on total health care expenditures, whether part of a plan or otherwise. *New York Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 656 (1995).

Nor does the Fair Share Act depend upon the existence of an ERISA plan. While an employer could comply with the law by altering its plan to provide more benefits, it could also provide benefits outside the construct of a plan, reduce the number of employees it has in the State, reduce pay, or simply pay the assessment. Where changes to a plan are merely one method of compliance with the law, the law will not be found to have reference to ERISA plans. For example, it has been held that prevailing wage laws that take benefits into account do not violate ERISA where they are operated on a "total package" basis, where an employer could comply either by increasing plan benefits, non-plan benefits or wages, so long as the total met the prevailing wage requirements. *HMI Mechanical Systems, Inc. v. McGowan*, 266 F.3d 142 (2nd Cir. 2001); *Burgio v. Compofelice*,

---

[1] Other researchers have reached similar conclusions. *See "What do we know about Wal-Mart? An Overview of Facts and Studies for New Yorkers,"* Bernhardt, Chaddha, and McGrath for the Brennan Center (August 2005) http://www.brennancenter.org/programs/downloads/aboutwalmart.pdf

107 F.3d 1000 (2nd Cir. 1997).[2] Similarly, in *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 332 (1997), it was held that a prevailing wage law that allowed paying an apprentice wage only for apprentices trained in an approved program was upheld where it did not require any apprenticeship program to meet the state standards, but left them with the option of paying them journeyman wages.

The Supreme Court has held that while the "relates to" language is extremely broad, it is not intended to modify "the starting presumption that Congress does not intend to supplant state law." *DeBuono v. ILA Medical and Clinical Services Fund*, 520 U.S. 806, 814 (1997). The assessment on employers to help fund the State's Medicaid program, while a revenue raising measure rather than a regulation of employers, clearly operates in fields that are traditionally occupied by the states – health and the protection of employees. Thus, it is presumed that Congress did not intend to supplant state law. *Cf., DeBuono v. ILA Medical and Clinical Services Fund*, 520 U.S. 806, 814 (1997) (Gross receipts tax on hospitals).

The Supreme Court has acknowledged that "connection with" is scarcely more restrictive than "relate to." *Egelhoff v. Egelhoff,* 532 U.S. 141, 147 (2001). Noting that neither infinite relations nor infinite connections can be the measure of preemption, the Court has stated that it is necessary to "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," *New York Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 656 (1995), in addition to the effect of the State law on ERISA plans. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 325 (1997).

The objectives of ERISA are to ensure that plans and plan sponsors would be subject to a uniform body of benefits law, thus minimizing the administrative and financial burden of complying with conflicting directives among states or between states and the federal government. *New York Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 656-657 (1995), and allowing nationwide administration of plans without the necessity of tailoring plans and employer conduct to the peculiarities of the law in each jurisdiction. *Id.* at 657. Thus, a state law is preempted if, for example, it requires administrators of a plan to look to state law in addition to plan documents to identify a beneficiary, *Egelhoff v. Egelhoff,* 532 U.S. 141, 148 (2001), or requires the payment of specific benefits, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). However, in *New York Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 659 (1995), the Court held that a surcharge on hospital patients covered by commercial insurers and HMOs but not on

[2] This consideration of a total amount paid for benefits is clearly different than the situation in *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), where benefits to be paid to injured employees eligible for workers' compensation had to be the same as benefits under the plan.

those covered by Blue Cross and Blue Shield was not preempted despite its "indirect economic effect" on choices made by insurance buyers.

The Fair Share Act does not in any way regulate the benefits to be available through plans, the eligibility for them, or the administration of them. In short, it imposes no requirements that would interfere with uniform nationwide plan management or set up contradictory requirements between states. An employer who wishes to avoid the assessment could do so by improving the benefits of, or expanding eligibility under, an existing plan. However, as discussed above, such an employer could also increase benefits outside the plan. *DaPonte v. Manfredi Motors, Inc.*, 2005 WL 2243638 (2nd Cir. 2005) (unpublished) (ERISA plan not the exclusive vehicle by which an employer may provide medical benefits to an employee). The assessment could also be avoided by such methods as reducing payroll, or by cutting employees below the 10,000 threshold. Finally, since the assessment is identical in cost to the option of improving benefits under the plan or expanding eligibility to raise costs to 8% (and administratively easier as well), the Act does not act as much of an "indirect economic influence" on plan decisions as did the surcharge permitted in *New York Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 659-660 (1995).

For all of these reasons it is my view that the Fair Share Act is not preempted by ERISA.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

Kathryn M. Rowe
Assistant Attorney General

JJC,Jr/KMR/kmr
busch06.wpd