Order Code RS22648
April 24, 2007

CRS Report for Congress

Required Healthcare Contributions, Fair Share Legislation, and *RILA v. Fielder*

Jon O. Shimabukuro
Legislative Attorney
American Law Division

Summary

In *RILA v. Fielder*, the U.S. Court of Appeals for the Fourth Circuit affirmed the decision of a federal district court that found Maryland's Fair Share Health Care Fund Act ("Fair Share Act") to be preempted by the Employee Retirement Income Security Act ("ERISA"), a federal statute that regulates pension and welfare benefit plans offered by private employers. The Fair Share Act would have required for-profit employers with 10,000 or more employees in the state to either spend a certain percentage of their total payroll on employee health insurance costs or pay to the state the amount their spending fell short of that percentage. This report discusses ERISA preemption and examines the Fourth Circuit's decision in the context of the U.S. Supreme Court's past decisions on the subject. The report also considers the impact the decision could have on other attempts to enact fair share legislation.

As the number of individuals without health insurance coverage has increased and the percentage of employers that offer health benefits to at least some of their employees has fallen, states have attempted to require certain large employers to increase the amounts they spend on employee health care.[1] So-called "fair share" legislation responds generally to the belief that many large employers provide inadequate medical coverage for their employees.[2] As a result, many uninsured and underinsured employees are forced onto Medicaid, the state-sponsored health program for low-income individuals.[3] Some healthcare advocates contend that average citizens and small businesses are becoming

---

[1] *See* Julia Contreras and Orly Lobel, *Wal-Martization and the Fair Share Health Care Acts*, 19 St. Thomas L. Rev. 105, 108 (2006) (citing statistics from the U.S. Census Bureau showing that the number of individuals without health insurance increased from 41.0 million in 2000 to 45.8 million in 2004). *See also* Kaiser Fam. Found. & Health Research & Educ. Trust, Employer Health Benefits: 2006 Annual Survey 4 (2006), *available at* [http://www.kff.org/insurance/7527/upload/7527.pdf] ("Sixty-one percent of firms offer health benefits to at least some of their employees ... Since 2000, the percentage of firms offering health benefits has fallen from 69%.").

[2] *See* Amy Vandenbroucke, *Fair Share Laws*, 9 DePaul J. Health Care L. 1343, 1346 (2006).

[3] *Id.*

increasingly tired of subsidizing large companies that "do not pay their fair share of health care."[4]

In January 2006, Maryland became the first state to adopt legislation that would have required for-profit employers with 10,000 or more employees in the state to either spend a certain percentage of their total payroll on employee health insurance costs or pay to the state the amount their spending fell short of that percentage.[5] Shortly after the Fair Share Health Care Fund Act ("Fair Share Act") was enacted, the Retail Industry Leaders Association ("RILA"), a retail trade association that includes Wal-Mart as a member, challenged the measure on the grounds that it was preempted by the Employee Retirement Income Security Act ("ERISA"), a federal statute that regulates pension and welfare benefit plans offered by private employers.[6]

In *RILA v. Fielder*, the U.S. Court of Appeals for the Fourth Circuit affirmed the decision of a federal district court that found the Fair Share Act to be preempted by ERISA.[7] This report discusses ERISA preemption and examines the Fourth Circuit's decision in the context of the U.S. Supreme Court's past decisions on the subject. The report also considers the impact the decision could have on other attempts to enact fair share legislation.

ERISA Preemption

ERISA provides a comprehensive federal scheme for the regulation of employee pension and welfare benefit plans offered by private employers. An "employee welfare benefit plan" is defined, in relevant part, as

> any plan, fund, or program ... established or maintained by an employer ... for the purpose of providing for its participants or their beneficiaries, ... medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment ....[8]

Although ERISA does not require an employer to offer pension or welfare benefits, it does mandate compliance with its provisions if such benefits are offered. Congress

---

[4] *Id.* at 1349.

[5] 2006 Md. Laws 1.

[6] 29 U.S.C. § 1001 *et seq.* RILA also alleged that the Fair Share Act violates the Equal Protection Clause of the U.S. Constitution. *See* Retail Industry Leaders Association v. Fielder, 435 F.Supp.2d 481 (D. Md. 2006).

[7] 475 F.3d 180 (4th Cir. 2007).

[8] 29 U.S.C. § 1002(1). *See* 29 U.S.C. § 1002(7) (defining the term "participant" as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit."); 29 U.S.C. § 1002(8) (defining the term "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.").

enacted ERISA to eliminate the conflicting and inconsistent regulation of pension and employee welfare benefit plans by state laws.

Section 514(a) of ERISA expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan ..."[9] The Supreme Court has interpreted this language as applying to any state law that "has a connection with or reference to such a plan."[10] The Court has indicated that "[u]nder this 'broad common sense meaning,' a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect."[11]

A state law that "relates to" an ERISA plan may avoid preemption if it regulates insurance within the meaning of ERISA's "saving clause." Section 514(b)(2)(A) "saves" from preemption "any law of any State which regulates insurance, banking, or securities."[12] However, an additional clause serves as an exception to ERISA's saving clause. Section 514(b)(2)(B), ERISA's "deemer clause," indicates that a state law that "purport[s] to regulate insurance" cannot deem an employee benefit plan to be an insurance company for purposes of regulation.[13]

Until 1995, the Court's decisions on ERISA preemption suggested generally that the application of section 514(a) was limitless. However, with its decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, the Court began to show a greater willingness to uphold various state laws.[14]

In *Travelers*, several commercial insurers challenged a state law that required them, but not Blue Cross and Blue Shield, to pay surcharges. The commercial insurers argued that the law was preempted by ERISA because it "relate[d] to" employer-sponsored health insurance plans. In addressing the application of ERISA's preemption clause, the Court first noted that there is a "presumption that Congress does not intend to supplant state law."[15] The Court then considered whether Congress intended to preempt state law by looking to "the structure and purpose" of ERISA.[16] The Court concluded that "nothing in the language of the act or the context of its passage indicates that Congress chose to

[9] 29 U.S.C. § 1144(a). ERISA does exempt from preemption certain laws, including generally applicable criminal laws, the Hawaii Prepaid Health Care Act, and state insurance laws regulating multiple employer welfare arrangements.

[10] *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1982).

[11] Ingersoll-Rand v. McClendon, 498 U.S. 133, 139 (1990).

[12] 29 U.S.C. § 1144(b)(2)(A).

[13] 29 U.S.C. § 1144(b)(2)(B). *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 733 (1984) (discussing ERISA's "saving clause" and "deemer clause").

[14] 514 U.S. 645 (1995).

[15] *Id*. at 654.

[16] *Id*. at 655.

displace general health care regulation, which historically has been a matter of local concern."[17]

Since *Travelers*, the Court has similarly recognized the states' ability to regulate matters of health and safety, and has concluded that state laws of general applicability are not necessarily preempted by ERISA.[18]

The Fair Share Health Care Fund Act and *RILA v. Fielder*

The Fair Share Act would have required for-profit employers with 10,000 or more employees in Maryland to either spend at least 8 percent of their total payroll on employee health insurance costs or pay to the state the amount their spending fell short of that percentage. Prior to enactment of the Fair Share Act, the Maryland General Assembly heard extensive testimony about the rising costs of the Maryland Medical Assistance Program, which provides access to healthcare services for the state's low-income residents.[19] The General Assembly also received information concerning Wal-Mart's failure to provide adequate health benefits to its employees, and Wal-Mart employees and dependents enrolling in Medicaid and the state children's health insurance program.[20]

Wal-Mart would have been the only for-profit employer in Maryland to be subject to the Fair Share Act.[21] Other for-profit employers with at least 10,000 employees in Maryland either satisfied the Fair Share Act's eight percent threshold or were exempted from the measure.[22]

Fielder, Maryland's Secretary of Labor, Licensing, and Regulation, made two arguments in favor of upholding the Fair Share Act. First, the Secretary contended that the Fair Share Act is a revenue statute of general application and not one that involves an employer's provision of healthcare benefits. He asserted that the revenue from the "payroll tax" imposed under the Fair Share Act would fund the Fair Share Health Care Fund established under the measure, which would be used to offset the costs of the Maryland Medical Assistance Program.[23]

---

[17] *Id*. at 661. In analyzing whether the state surcharges violated ERISA's preemption provision, the Court stated: "In *Shaw*, we explained that 'a law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.' The latter alternative, at least, can be ruled out ... [T]he surcharge statutes cannot be said to make 'reference to' ERISA plans in any manner." *Id*. at 656 (citations omitted).

[18] *See* De Buono v. NYSA-ILSA Medical and Clinical Services Fund, 520 U.S. 806 (1997) (state tax on gross receipts of health care facilities not preempted by ERISA); California Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316 (1997) (California's prevailing wage law not preempted by ERISA).

[19] *Fielder*, 475 F.3d at 183.

[20] *Fielder*, 475 F.3d at 184.

[21] *Fielder*, 475 F.3d at 185.

[22] *Id*.

[23] *Fielder*, 475 F.3d at 190.

Second, the Secretary argued that the Fair Share Act does not have a connection with employee benefit plans because an employer could act in ways that do not involve such plans.[24] For example, an employer could increase healthcare spending by establishing on-site medical clinics or by contributing more money to employees' health savings accounts. An employer could also refuse to increase benefits under an ERISA plan and simply pay the amount by which its spending fell short of the measure's eight percent threshold.[25]

The Fourth Circuit rejected both of the Secretary's arguments. Acknowledging the legislative history of the Fair Share Act and what the Maryland General Assembly knew at the time of its consideration, the court indicated that the measure "could hardly be intended to function as a revenue act of general application."[26] The court stated:

> [L]egislators and interested parties uniformly understood the act as requiring Wal-Mart to increase its healthcare spending. If this is not the act's effect, one would have to conclude, which we do not, that the Maryland legislature misunderstood the nature of the bill that it carefully drafted and debated. For these reasons, the amount that the act prescribes for payment to the State is actually a fee or a penalty that gives the employer an irresistible incentive to provide its employees with a greater level of health benefits.[27]

In response to the Secretary's second argument, the Fourth Circuit distinguished the Fair Share Act from state laws that were found to not be preempted by ERISA. Citing *Travelers*, the court noted that the Supreme Court upheld the law in that case because it did not act directly upon employers or their plans, but merely created "an indirect economic influence" on plans.[28] In contrast, the Fourth Circuit found that the Fair Share Act "directly regulates employers' structuring of their employee health benefit plans."[29] The court indicated that "the only rational choice employers have" is to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold.[30]

The availability of alternatives to increase healthcare spending without affecting an ERISA plan did not persuade the Fourth Circuit. The court noted that from an employer's perspective, the categories of ERISA and non-ERISA healthcare spending would not be isolated, unrelated costs: "Decisions regarding one would affect the other and thereby violate ERISA's preemption provision."[31]

---

[24] *Fielder*, 475 F.3d at 194-95.

[25] *Fielder*, 475 F.3d at 195.

[26] *Fielder*, 475 F.3d at 194.

[27] *Id*.

[28] *Fielder*, 475 F.3d at 195 (citing *Travelers*, 514 U.S. at 659).

[29] *Id*.

[30] *Fielder*, 475 F.3d at 193.

[31] *Fielder*, 475 F.3d at 197.

The dissent maintained that the Fair Share Act is not preempted by ERISA because it offers a means of compliance that does not impact ERISA plans.[32] The dissent explained that an employer can comply with the measure by paying an assessment or increasing spending on employee health insurance. By not expressing a preference for one method over the other, the dissent maintained that the act is not preempted.[33] The dissent suggested that preemption would be more likely if the Fair Share Act dictated a plan's system for processing claims, paying benefits, or determining beneficiaries.[34] However, any burden imposed on ERISA plans by the Fair Share Act was "simply too slight to trigger ERISA preemption."[35]

Conclusion

On April 16, 2007, the Maryland Attorney General announced that his office would not seek review of the Fourth Circuit's decision by the Supreme Court.[36] While the impact of *RILA v. Fielder* on other attempts to enact fair share legislation may not be entirely certain, the sharp decrease in the number of bills that have been introduced in 2007 suggests that state legislatures may be responding to the Fourth Circuit's decision.[37]

In *Fielder*, the Fourth Circuit acknowledged the consideration of fair share legislation in Minnesota and the adoption of such legislation in two New York counties.[38] The court stated: "If permitted to stand, these laws would force Wal-Mart to tailor its healthcare benefit plans to each specific State, and even to specific cities and counties. This is precisely the regulatory balkanization that Congress sought to avoid by enacting ERISA's preemption provision."[39] If other fair share legislation is found to be preempted by ERISA, states will have to examine other ways to respond to their growing uninsured and underinsured populations.

---

[32] *Fielder*, 475 F.3d at 198.

[33] *Fielder*, 475 F.3d at 201.

[34] *Fielder*, 475 F.3d at 202.

[35] *Id*.

[36] *Maryland Attorney General Will Not Seek Supreme Court Review of "Fair Share" Law*, Daily Lab. Rep. (BNA) No. 73 (April 17, 2007).

[37] *See* Nat'l Conf. of St. Legislatures, *2006-2007 Fair Share Health Care Fund or "Pay or Play" Bills: Can States Mandate Employer Health Insurance Benefits?*, *at* [http://www.ncsl.org/programs/health/payorplay2007.htm] (identifying 46 fair share or "pay or play" measures in 2007 versus 4 in 2007). The term "pay or play" refers to "states using their tax authority to assess employers (pay) while giving them the option to avoid the fee by providing health care or coverage to their workers (play)."

[38] *Fielder*, 475 F.3d at 194. Massachusetts has also enacted legislation that requires employers with 11 or more employees that do not provide health insurance to their employees to pay $295 per year per employee to a state-operated fund that will be used to pay for the medical care of the uninsured. *See Practitioners Debate Impact of Ruling That Maryland's "Wal-Mart Law" is Preempted*, Daily Lab. Rep. (BNA) No. 16 (January 25, 2007).

[39] *Fielder*, 475 F.3d at 194.