A Special Report Prepared By:
The Self-Insurance Institute of America, Inc.

Golden Gate Restaurant Association

Vs.

City & County of San Francisco

July 1, 2008

www.siia.org
**SIIA Special Report:**

**Employer Mandates and ERISA Preemption**

*Golden State Restaurant Association v. City & County of San Francisco*

In the most important ERISA preemption case since *Travelers*, the Ninth Circuit in California will rule whether the city of San Francisco can require employers to spend specific amounts on health care for their employees or pay a fee to the City to offset the cost of public coverage. The final outcome of this “bottom-line” issue for employers, including employers that sponsor self-insured group health plans, will have sweeping national implications. Regardless of the result in the Ninth Circuit, this crucial case is certain to be appealed to the U.S. Supreme Court later this year.

**Why Golden Gate Is Important?**

*Golden Gate Restaurant Association v. the City and County of San Francisco* raises the important question of whether the Employee Retirement Security Act of 1974 (ERISA) 1/ preempts the employer health care spending mandates in San Francisco’s Health Care Security Ordinance. (Ordinance). 2/

The outcome of this case will have a significant impact on so-called state “fair share laws” that require employers to make minimum outlays to their health plans or to make contributions in the required amounts to a state or local government fund.

In recent years, several states and local jurisdictions have considered and adopted fair share laws that apply to employers that pay less than a specified percentage of their payrolls to health care costs. Maryland, Suffolk County (NY) and the city of San Francisco have passed such laws—all of which have been struck down by federal courts on ERISA preemption grounds.

So far, the courts have ruled that mandated minimum spending requirements have a prohibited connection with ERISA plans and are preempted.

In the Maryland case, the U.S. Court of Appeals (4th Circuit) held that the state law ran afoul of the federal law requirement for nationwide uniformity—a baseline tenet of ERISA. In the Suffolk County case, the U.S. District Court held that the local law was preempted for the same reason. Most recently, a U.S. District Court in California held that the San Francisco Ordinance was preempted by ERISA. The district court decision has been appealed to the 9th Circuit.

If the final 9th Circuit decision in *Golden Gate* holds that ERISA does not preempt the Ordinance, then a clear split will occur between two very influential appellate circuits—the Fourth and the Ninth Circuit—setting the stage for a crucial U.S. Supreme Court review.
The San Francisco Ordinance

In spite of the limits placed by federal law on the ability of states and local jurisdictions to affect the design of ERISA plans, in July 2006 the City and County of San Francisco enacted an Ordinance that established a City-run program requiring covered employers to make “reasonable” health care expenditures on behalf of their covered employees to their health plan—or pay into a city fund.

Generally, the Ordinance applies to employers who engage in business in San Francisco and who employ 20 or more employees and non-profit employers with 50 or more employees.

Covered Employers: Medium sized employers (20-99 employees) must make health care expenditures of $1.17 per hour worked for each covered employee. Large employers (100 or more employees) must pay $1.76 per hour.3/

Small businesses with fewer than 20 employees are exempt from the minimum spending requirements. Part time workers are covered as long as they work 10 or more hours a week within the city’s borders.

“Health care expenditures” means:

Any amount paid by a covered employer to its covered employees or to a third party on behalf of its covered employees for the purpose of providing health care services for covered employees or reimbursing the cost of such services for its covered employees. 4/

Covered employers must make quarterly minimum health expenditures for all workers employed at least 90 days who perform at least 10 or more hours per week within San Francisco. Certain employees are exempt from the spending requirement, including Managers earning more than $76,851 in 2008 and those who sign a Voluntary Waiver Form.

Employers also are required to maintain accurate records to show that required expenditures have been made every calendar quarter. An employer must differentiate hours worked by employees inside and outside the City, and calculate the hours worked by and the location of telecommuters.

The employer also must provide an annual report of this information to the City, and notify an employee when payment has been made to the City on his or her behalf.

Employers can satisfy their health spending requirements in several ways, including: (1) provide a group health program; (2) contribute to a HSA or FSA; or (3) reimburse employees for health care expenses.
Employers that fail to comply with these provisions are subject to a monetary penalty of 150% of the amount owed for failure to make contributions.

The effective date for the employer spending requirement is January 9, 2008 for employers with 50 or more workers, and April 9, 2008 for for-profit employers with 20-49 employees.

Designed to provide the city’s estimated 80,000 uninsured residents with access to primary and preventive health coverage, the program is administered by the Department of Public Health and has 27 sites for enrollees throughout the city.

**Litigation:** In November 2006 Golden Gate filed a complaint against the City in federal district court, arguing that ERISA preempts the Ordinance. The district court agreed and on December 26, 2007, granted summary judgment to the Association and enjoined the City from enforcing the Ordinance. The district court held that the Ordinance spending requirements had an impermissible connection with ERISA plans.

In January 2008 the 9th Circuit stayed the district court’s judgment pending appeal and allowed the Ordinance provisions to take effect. Oral argument in the 9th Circuit was on April 17, 2008, and a decision is expected this summer.

**The ERISA Preemption Argument**

More than 132 million individuals are covered by voluntarily provided employer sponsored health plans under the ERISA federal framework. A pivotal element of the federal law is ERISA’s sweeping preemption language that supersedes state and local laws that would regulate employer sponsored benefit plans.

Section 514 (a) clearly states that ERISA preempts:

- Any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. 6/

- State laws including laws, decisions, rules, regulations or other State action having the effect of law; and,” State” is defined to include subdivisions and agencies of a state. 7/

Interpreting ERISA and consistent with SIIA’s position, the U.S. Supreme Court has held that a key purpose of the federal law is to provide a uniform regulatory regime over employee benefit plans. In Travelers, the court stated that a state law has a prohibited connection with ERISA if it “mandates employee benefit structures or their administration. Such laws include not only laws mandating specific benefits, but also laws that require plans “to calculate benefit levels” differently than in other states.” 8/
The U.S. Labor Department, the federal agency responsible for enforcing ERISA, has consistently supported the preemption provisions as a core tenet of the federal law. In its recent statement in *Golden Gate* supporting ERISA preemption, DOL stated in an *amicus* brief filed in the 9th Circuit:

> The employer spending requirements are preempted because they have a prohibited connection with ERISA plans. Specifically, all of the options for compliance require an employer to create or alter an ERISA plan. The City payment option, in fact, constitutes a “city mandated benefit plan” that is preempted by ERISA. The other payment options permitted by [the Ordinance] also require the establishment or maintenance of ERISA plans. Moreover, even if one or more of the options did not require the creation or alteration of an ERISA plan, the employer spending requirements would still be preempted because they demonstrably interfere with nationally uniform plan administration.9/

**Uniformity in ERISA Plans Impacted**

Applying these principles to the *Golden Gate* case, the potentially adverse effect on existing ERISA plans is clear, i.e. the Ordinance seriously interferes with the ability of covered employers to maintain a uniform plan for its employees. Under the local Ordinance a covered employer can maintain uniformity only by changing the benefits under an existing ERISA plan so that all employees receive benefits as prescribed by San Francisco.

Alternatively, the employer could give employees in San Francisco different benefits, but lose the advantage of uniform company-wide plan administration. In this connection, the employer would have to adjust its administrative practices to the unique provisions of the Ordinance, such as special rules for calculating hours worked inside and outside of San Francisco, detailed recordkeeping mandates, and quarterly determinations of an employer’s compliance with the contribution mandates. 10/

These problems would be compounded by the effect on plans if other cities or states adopt laws similar to the San Francisco Ordinance. Laws requiring employers to calculate health spending requirements based on a different percentage of wages (rather than hours worked), different coverage exceptions, and different record keeping requirements would create a costly administrative nightmare—exactly what ERISA’s preemption provisions were designed to prohibit.

Recognizing this problem, the U.S. Department of Labor in its *amicus* brief supporting ERISA preemption in *Golden Gate* stated:

> A state law is independently preempted if it interferes with nationally uniform plan administration. This is so because Congress wanted to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal government. 11/
States/Local Laws and Health Reform

As health reform issues continue to attract national attention, states and local jurisdictions are likely to continue to seek new ways to fund (subsidize) their health reform initiatives and arrangements through fees, assessment and taxes on employment based plans.

Employers can be expected to argue that they are an inappropriate source of funds to finance mandatory public sector coverage for the uninsured. SIIA supports funding such programs from general revenues, rather than targeting employers and voluntary private sector benefit plans that already provide health coverage for over 130 million individuals.

In the final analysis, as noted in this Special Report, there is a very strong argument that local “fair share” laws such as the San Francisco Ordinance are preempted by ERISA. However, new public policy issues that raise significant ERISA preemption questions in the context of state/local laws and health reform can be expected to attract national attention. In the search for solutions to the serious problem of the uninsured, efforts to impose greater state regulation on employers and the employment-based health care system are likely to persist. As states and Congress continue to address this issue, the outcome of the debate will have a significant impact on the future of the current voluntary, private U.S. health care system and self-insurance.

About SIIA

SIIA is a national association that represents companies involved in the self-insurance and alternative risk transfer marketplace. Additional information about the association can be accessed online at www.siia.org, or by calling (800) 851-7789.

NOTES

2. San Francisco Health Care Security Ordinance
4. Id. Sec. 14.1 (b)(7)
5. Golden Gate Restaurant Association v. City & County of San Francisco
   512 F.3d 1112 (9th Cir. 2008)
6. ERISA Sec.1144 (a)
7. ERISA Sec. 1144 (c)(1),(2)
10. S.F. Cal. Admin. Code Sec. 14.3 (b)
11. Id. (DOL Amicus Brief)