Special Report

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The Basis of Today's Employer-Sponsored Health Plans

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"ERISA" is one of those words that everyone knows, but not everyone understands. It is both the anchor of employee health plans for nearly 133 million Americans and the sometimes-criticized "obstacle" to state-mandated health plans. Every public figure that proposes health care reform has something to say about ERISA, and some members of state legislatures and Congress say they would like to weaken it. This SIIA Special Report will review how and why ERISA came about and explain the value of its federal protections for employee benefit programs.

ERISA Plans: The Main Source of Coverage for Workers

The ERISA-based employment based system is now the main source of health care coverage for American workers and their families, covering approximately 132.8 million individuals in 2006, or 82 percent of the population with employment based health benefits. Workers in private sector firms and their dependents are included in the ERISA population, which includes both self-insured and insured plan participants.1/

This enormous growth to this level of coverage can be largely attributed to ERISA's broad preemption language. Within the ERISA framework, state mandated benefits that apply to insured plans are preempted as applied to self-insured health plans. These state mandated benefits increase the cost of basic health coverage from a little less than 20 percent to more than 50 percent, depending on the state. Currently, there are more than 1,900 state mandates around the country and the number is growing.2 /

At the same time, federally regulated self-insurance gives plan sponsors the flexibility to design comprehensive benefit programs that are structured to meet the specific needs of their workforce.

Pre-ERISA Regulation

To understand the rationale for preemption, it is useful to review the pre-ERISA legal framework and the key congressional actions leading up to passage of the law.

Before ERISA was enacted, employee benefit plans were regulated by a diverse and often conflicting "patchwork quilt" of state laws. Multi-state employers experienced cost and administrative burdens while striving to monitor and comply with laws that differed from state to

state. Costly and inconsistent state mandates in particular were a persistent problem for employers who tried to design efficient benefit plans and programs at a reasonable cost tailored to the needs of its workforce

At the federal level, health plans were regulated under the Welfare and Pension Plans Disclosure Act (WPPDA).[3/] Containing weak reporting, disclosure and bonding provisions, the limited purpose of WPPDA was to provide employees with information so they could monitor their plans and take action in case of plan mismanagement.

In 1962, twelve years prior to passage of ERISA, Congress amended the WPPDA to give the Secretary of Labor somewhat more enforcement power over plans. However, WPPDA's minimum standards for employee benefit plans proved inadequate and the push in Congress for greater federal regulation of employee benefits gained momentum. In 1974, after over 10 years of debate and deliberation, Congress repealed the WPPDA and enacted ERISA to provide a comprehensive federal framework for the regulation of employee benefit plans.

Preemption Pivotal in ERISA

An important cornerstone of ERISA's goal of national uniformity is the law's federal preemption provision set forth in Section 514.

ERISA Section 514(a): This provision states the general rule that (with certain exceptions) ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan covered by ERISA." As defined in ERISA, the term "employee benefit plan" includes both pension and welfare (health) plans. The term "state law" includes "all laws, rules, regulations, or other state actions which have the effect of law, of any State."[4/]

As ERISA's legislative history confirms, the intent of Congress in enacting Section 514(a) was to :

- ***Allow employers that operate in multiple states to offer uniform benefits across state lines;***

- ***Facilitate greater cost savings and administrative efficiencies than plans subject to varying state requirements.***

Since most large employers that sponsor ERISA plans operate across state lines, the administrative efficiencies and cost savings available to multi-state employers under ERISA are major factors for the positive results of this important federal law.

Savings Clause: A notable exception to federal preemption is the so-called "savings clause." State laws regulating insurance, banking, or securities are exempted from the preemption provisions under the savings clause, which was intended to limit the scope of ERISA preemption in areas reserved to traditional state regulation. In enacting the savings clause, Congress deliberately intended to preserve state regulatory authority over the *business of insurance* set forth in the McCarren-Ferguson Act of 1945.

Deemer Clause: However, providing a unique *exception to the* savings clause Congress limited the scope of the savings clause with the so-called "deemer clause" which states:

> Neither an employee benefit plan. . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer. . . or to be engaged in the business of insurance. . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks , trust companies, or investment companies.

The "deemer" provision was included in ERISA to prevent the insurance savings clause from leading to the characterization of self-insured employee benefit plans as insurance companies subject to state regulation.

Thus, Congress specifically codified the long standing distinction between insurance and self insurance when it adopted the "deemer" clause, which expressly provides that states may not "deem" self-funded plans to be insurers

ERISA Legislative History

As noted above, ERISA's legislative history clearly demonstrates that Congress intended to replace the often-conflicting system of state and local regulation of employee benefit plans with a uniform source of law.

ERISA's history reveals that Congress devoted considerable attention to the preemption issue. Key statements made during the congressional debates confirm that Congress intended that ERISA be broadly preemptive. Key portions of the legislative history include:

House: Congressman John Dent, chairman of .the Subcommittee on Labor of the House Labor and Education Committee and a key drafter of ERISA, stated on the House floor in adopting the conference committee report:

> I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. 5/

Senate: Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare and a chief architect of ERISA, stated on the Senate floor:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law. 6/

Specifically, Congress sought deliberately to eliminate the need for employers to administer their plans differently in each state where they have employees. Under ERISA, multi-state companies can offer cost efficient benefits and administer a unified plan for employees in all jurisdictions where they operate.

Inconsistent and varying state requirements impact the *direct cost* of employer-sponsored plans offered by multi-state employers. Illustrative costly state requirements include mandates such as specialized health services including infertility services, pastoral counseling or acupuncture; administrative mandates such as claims review procedures, special nondiscrimination rules, marital status, plan enrollment procedures, rules governing basic plan design; and state litigation laws on causes of action and damage remedies.

In addition, plan sponsors face a number of *indirect plan costs* in trying to deal with different rules in different states that impair the economies of scale achievable through integrated and uniform benefits programs. This includes the significant costs and administrative inefficiencies required by multi-state employers to keep abreast of and comply with laws, rules and court decisions of more than 50 state jurisdictions (including the District of Columbia).

Federal Laws Not Preempted By ERISA

While ERISA plans are protected from state regulation, they are not exempt from other federal laws. ERISA states that nothing in the law's provisions shall "alter, amend, invalidate, impair or supersede any law of the United States."7/ In the 35 years since passage, Congress has passed a number of new federal requirements as ERISA amendments – but none have diminished the vitality of the preemption language.

For example, some new federal mandates added to the law that are not preempted include ERISA amendments to require health care continuation coverage to employees and dependents who lose eligibility for group coverage;8/ prevent preexisting condition limitations;9/ cover minimum hospital stay after childbirth;10/ and require mental health benefit parity.11/

While adding new requirements to ERISA, these federal mandates apply uniformly to all employment based group health plans, regardless of the state where the employee works.

About SIIA

SIIA is a national trade 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

1. *ERISA Preemption: Implications for Health Reform and Coverage,* Employee Benefits Research Institute (EBRI), Issue Brief No. 314, February 2008.
2. *Health Insurance Mandates in the States 2007,* Council for Affordable Health Insurance (2007)
3. 29 U.S.C. 301 *et seq.*
4. ERISA Sec. 514
5. 120 Cong. Rec. 299197 (Remarks of Rep. Dent.)
6. 120 Cong. Rec. 29933 (Remarks of Sen. Williams)
7. ERISA Sec. 514 (d), 29 U.S.C. 1144(d)
8. ERISA Sec. 601-08, added by *Consolidated Omnibus Reconciliation Act of 1985* (COBRA), P.L. No.99-272, Sec. 10002(a)(1986
9. ERISA Sec. 701, added by *Health Insurance Portability and Accountability Act*

of 1996 (HIPPA) P.L.No.104-191, Sec.101(a) (1996)

10. ERISA Sec. 711, added by *Newborns' and Mothers' Health Protection Act of 1996.* P.L. No. 104-204, Sec. 603(a)(5) (1996)
11. ERISA Sec. 712, added by Mental Health Parity Act of 1996, P.L. No. 104-204, Sec. 702 (a) (1996)