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## Legal News

### Health Care Policy Employers Complying With Bay City Law, While Awaiting Outcome of Preemption Case





Although San Francisco's Health Care Security Ordinance (HCSO) may eventually be preempted by the Employee Retirement Income Security Act, most employers are preparing to comply with the law, Christine Keller, leader of Groom Law Group's health care practice, said March 7 during a teleconference.

The HCSO contains an employer health care mandate known as an employer spending requirement (ESR). The HCSO has been the source of an ongoing court battle in *Golden Gate Restaurant Assoc. v. City and County of San Francisco*. The U.S. Court of Appeals for the Ninth Circuit, which is located in San Francisco, recently stayed a lower court's injunction barring implementation of the city ordinance, allowing the law to take effect as scheduled (6 PBD, 1/10/08 ; 35 BPR 123, 1/15/08 ; 42 EBC 2193).

For employers with more than 50 employees, that start date was Jan. 1, 2008. Employers with 20 to 49 employees, the effective is April 1, 2008. Employers with fewer than 20 employees are exempted from the law, Keller said.

The challenge to the law is expected to be heard by the U.S. Court of Appeals for the Ninth Circuit in mid-April, according to Donald Willis, also with Groom Law Group, Washington, D.C., and a decision is expected "this summer no matter what," he said.

In Groom's view, the ordinance should be preempted, because the law seems very similar to the Maryland pay or play law, as well as the Suffolk County, N.Y., Fair Share for Health Care Act, both of which were preempted by ERISA, Keller said. "Many folks wonder how this law can go forward," she added.

The Maryland law was nixed by the U.S. Court of Appeals for the Fourth Circuit in *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180, 39 EBC 2217 (4th Cir. 2007); (11 PBD, 1/18/07;  34 BPR 207, 1/23/07 ). The Suffolk County law was held to be preempted by the U.S. District Court for the Eastern District of New York in *Retail Industry Leaders Ass'n v. Suffolk County*, 497 F.Supp.2d 403, 41 EBC 1129 (E.D.N.Y. 2007) (137 PBD, 7/18/07 ; 34 BPR 1745, 7/24/07 ).

The American Benefits Council, among others, will be submitting an amicus brief arguing that the San Francisco law should be preempted by ERISA, Keller said.

#### Details of Law

The ESR applies to all covered employers, which are grouped in two classes, large (100 employees or more) and medium-sized (20-99 employees), Keller said. Covered employers are also those that engage in business within the city, and are required to obtain a valid San Francisco business registration certificate, Keller added. Also exempt from the law are

nonprofit organizations with fewer than 50 employees and public employers, Keller said.

The HCSO requires employers to make a minimum amount of health care expenditures each quarter for each covered employee.



Covered employees include any person who works at least 10 hours per week and who has been employed for at least 90 calendar days. Covered employees also include temporary employees, seasonal employees, and part-time employees, Keller said.

The law also requires "fairly rigorous" recordkeeping, employer notice, and reporting requirements, Keller said. The first mandatory annual report is due April 30, 2008, and must provide information for 2007, including health care expenditures for each covered employee, Keller pointed out.



The penalties for noncompliance can be very severe, Keller said. For example, the failure to meet the ESR can result in up to 1.5 times the unpaid health care expenditure amount plus 10 percent interest, capped at \$1,000 per employee per week.

Employers who retaliate against any particular individual may be fined \$100 per day per targeted person. "\$100 per day would add up quickly," Keller said.

### ERISA Preemption Challenge

The city filed an appeal and sought an emergency stay to allow the ordinance to go into effect as planned. The Ninth Circuit, in an opinion by Judge William A. Fletcher, granted the stay, saying that the city had shown a substantial likelihood of success on the merits of its claim that **ERISA** does not preempt the law (6 PBD, 1/10/08 ; 35 BPR 123, 1/15/08 ).

The court acknowledged that Section 514(a) of **ERISA** preempts "any and all State laws insofar as they ... relate to any employee benefit plan" governed by **ERISA**. But it found that the ordinance does not relate to an **ERISA** plan because it does not require an employer to adopt or modify a plan, nor does it make a forbidden "reference to" an **ERISA** plan.

Keller noted possible outcomes of the Ninth Circuit's review of *Golden Gate*. If the court affirms the U.S. District Court for the Northern District of California's decision, which ruled Dec. 26, 2007, that the ordinance was preempted by **ERISA** (247 PBD, 12/28/07 ; 35 BPR 48, 1/1/08 ), then the result would be a chilling effect on other states trying to pass fair share laws.

A successful defeat of the Bay City ordinance may also prompt challenges to other state fair share laws, such as that enacted by Massachusetts, Keller said.


However, if the Ninth Circuit panel reverses the district court's decision, then there would be a petition for an en banc hearing from the Ninth Circuit or a petition for certiorari to the Supreme Court to resolve the split in the federal appeals courts, Keller said. A reversal also may encourage more states to adopt fair share laws, she added.

Either the Ninth Circuit or the Supreme Court is likely to hold that **ERISA** preempts the ordinance, for the same reasons the Fourth Circuit found in its decision in *Felder*, Keller said. The district court that held **ERISA** preempted the Suffolk County law relied on *Felder*, Keller pointed out, but the Ninth Circuit failed to address the *Felder* decision when it granted the stay in January.

### Other State Reform Efforts

Larger state health care reforms will have to wait until the outcome of the San Francisco case, Heather Meade, a benefits attorney with Groom Law Group, said.

In the meantime, several states have held blue ribbon councils, and several states have passed legislation focusing primarily on transparency, cafeteria plans, and extending dependency coverage, in some cases, to dependents as old as 30 years of age.

Meade said that most state reforms will tend to focus on "smaller reforms." 

*By Sean Forbes*

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