

October 2, 2008

MEMORANDUM TO CLIENTS

Re: Ninth Circuit Holds ERISA Does Not Preempt San Francisco Health Care Security Ordinance

On September 30, 2008, a three-judge panel for the Ninth Circuit Court of Appeals ruled that the San Francisco Health Care Security Ordinance (the "Ordinance") was not preempted by the Employee Retirement Income Security Act ("ERISA"). *Golden Gate Rest. Ass'n v. City & County of San Francisco*, No. 07-17370, slip op. (9th Cir. Sept. 30, 2008). This ruling reversed a district court decision that previously held that ERISA preempted the Ordinance. The Ordinance has been in full effect since January 9, 2008, due to the same panel granting a stay of the district court order until it decided the issue on appeal.

The Ordinance requires employers engaged in business in the City and County of San Francisco (the "City") spend a minimum amount on health care for their employees. Employers that do not meet the minimum requirement must pay the City the difference. The panel referred to this penalty as the "City-Payment Option." The Ordinance also establishes the Healthy San Francisco program ("HSF"), a City run health care program that provides health care services to City residents who do not have health insurance. Funds paid through the City-Payment Option are either used to fund HSF or to establish medical reimbursement accounts for employees who are not City residents or who have health insurance.

The panel based its ruling on the following conclusions:

- The Ordinance does not create an ERISA plan because (i) the City-Payment Option's administrative obligations are not sufficient to create an ERISA plan because employers are not responsible for the appropriate spending of funds, and (ii) HSF is not an ERISA plan because its primary funding comes from tax dollars not employer contributions, and employers do not control the benefits employees receive from HSF;
- The Ordinance is not connected with ERISA plans because it does not (i) require employers to adopt or provide specific benefits under an ERISA plan, (ii) affect the administration of ERISA plans, (iii) have direct economic influence on plan administrators that binds them to a particular choice, (iv) require employers to follow specific plan rules, or (v) impose the administrative and financial burden of complying with conflicting directives;
- The Ordinance does not make reference to ERISA plans because (i) it does not act immediately and exclusively on ERISA plans, (ii) the employer spending requirement is measured in terms of employer payments to ERISA plans or other entities and not in terms of the benefits provided by ERISA plans or other entities, and (iii) it is "fully functional even in the absence of a single ERISA plan"; and

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- The Ordinance is distinguished from the Maryland law in *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007), which the Fourth Circuit struck down as preempted by ERISA, because the City-Payment Option provides a benefit to employers and employees and the Maryland law's penalty did not.

The panel's ruling means that the Ordinance will continue in full affect unless the panel's decision is overturned. The plaintiff, Golden Gate Restaurant Association ("GGRA"), has ten days to request an en banc review of the case. An en banc review means that eleven (11) judges from the Ninth Circuit would review the panel's decision. Even if GGRA requests en banc review, the Ninth Circuit may not grant that request. GGRA may also request review from the Supreme Court of the United States, which also may reject the request. GGRA may choose to seek Supreme Court review regardless of whether it seeks en banc review from the Ninth Circuit.

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