Update on Health Care Reform: Has San Francisco Finally "Cracked the ERISA Code?"

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With employers and employees alike burdened by skyrocketing health care costs, and more than fifty million Americans lacking health care coverage, it is becoming more and more likely that some sort of change to the current health care system is imminent. Just this week, representatives of hospitals, insurance companies, drug makers and physicians joined the President in announcing a promise to reduce the growth of health care spending — a move which some health care pundits believe could ease the path toward the goal of comprehensive health coverage. And Wednesday, Speaker of the House Nancy Pelosi pledged to bring health care legislation before the House by the end of July.

There are likely to be many discussions in the near future of various possible approaches to health care reform. One persistent question, however, is whether health care reform will ultimately be national in scope, or — if national action is not forthcoming — will be enacted state by state or even city by city.

ERISA Preemption. The problem with enacting health care legislation at the local level is that ERISA has preempted such attempts since its enactment in 1974. Originally, ERISA was drafted to put a stop to widespread mismanagement and abuse of employee pension plans. Back in 1974, the current crisis in health care access and affordability still lay far in the future, and many experts assumed that sweeping federal health care reform would soon take place. So, in the last-minute horse trading that characterizes the passage of much legislation, the sponsors of the act included a provision whereby ERISA would preempt any local laws that related to an employee welfare benefit plan covered by ERISA.

San Francisco's Health Care Security Ordinance. In 2007, the city of San Francisco estimated that it had 73,000 uninsured residents, and resolved to try to provide those individuals with health care coverage. San Francisco tried to design its Health Care Security Ordinance ("HCSO," otherwise known as the "Healthy San Francisco" program) to avoid what seemed in the past to be the insurmountable obstacle of ERISA preemption. In fact, according to a leading ERISA and health policy expert, George Washington University professor Phyllis Borzi, San Francisco's HCSO may actually be the first local effort at health care reform to successfully "crack the code" for avoiding ERISA preemption.

A New Benefit Program, or Just a New Fee? The HCSO provides that any business with 20 or more employees must contribute quarterly fees to the program to fund coverage for lower-income, uninsured San Francisco residents, unless such business pays an equivalent amount into an approved health care coverage program. If the substance of the HCSO boiled down to the establishment of a new employee health benefit plan at a local level, then it would likely be preempted by ERISA. If, however, the HCSO merely imposed a fee on San Francisco businesses to fund the Healthy San Francisco program, says Professor Borzi, it would not be preempted.

Litigation. Because the costs that the ordinance imposes upon San Francisco employers are significant, the Golden Gate Restaurant Association ("GGRA") has been involved in litigation since 2007 to try to overturn the ordinance. So far, these efforts have been unsuccessful. A three-judge panel of the Ninth Circuit ruled at the end of last September that the program

was not preempted by ERISA. GGRA's subsequent application to the Supreme Court for a stay of the Ninth Circuit's decision was denied at the end of March. The next step for GGRA would be the filing of a petition for certiorari with the Supreme Court by the end of this month, but at this time, according to an attorney familiar with the litigation, it is by no means certain the Court would grant such a petition.

I**mplications for Health Care Reform in General.** If Congress does not take decisive action to enact sweeping health care legislation at the federal level – or if Congress does so but still permits reform at the local level – the fate of HCSO would help determine the direction of future health care reform. If the Supreme Court were to take the case but subsequently rule against the city of San Francisco, experts believe that it is unlikely any other states, counties or municipalities would attempt to design future universal health care programs funded with employer payments. However, if the Supreme Court does not agree to take the case, or takes it and still affirms the Ninth Circuit decision, then the Healthy San Francisco program may provide much-needed guidance to other jurisdictions that wish to craft programs of universal health care access for their citizens.

Fenwick & West LLP will be posting updates on future developments in health care reform as they occur, as well as the ultimate fate of the Healthy San Francisco Program. For more information, please contact Mona Clee in the Employee Benefits Group.

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