

## Fast Facts

- ERISA health plans cover 132.8 million Americans.
- The goal of ERISA is to preserve and expand the private, voluntary, employer-provided benefit system.
- The cornerstone of ERISA is the law's preemption provision designed to eliminate the impact of a patchwork of costly and conflicting state regulations.
- Today an estimated 1,900 state mandates increase the cost of basic health coverage by 20% to 50%.
- States have broad authority to enact health care reform. However, state and local advocates of pay-or-play proposals are challenging ERISA and urging a narrowing of its preemption provision. Legal challenges are unfolding across the country.
- CIGNA strongly believes that the ERISA preemption provision must be retained in order to support the health care needs of millions of Americans on a cost-effective and efficient basis.

## I. INTRODUCTION

- As of 2006, approximately 132.8 million Americans received health coverage from their employers through the Employee Retirement Income Security Act of 1974 (ERISA) plans that were either self-insured or fully insured.
- A series of U.S. Supreme Court decisions have found that fully insured health plans that employers purchase from insurance companies are subject to regulation directly at the federal level and indirectly at the state level, whereas self-insured plans are regulated exclusively at the federal level.
- The rising cost of health coverage, however, has strained the employer-provided health care system.
- At the same time, many states have experimented with health care reform—or are attempting to do so—in an effort to expand coverage of the uninsured.
- Aware that these reform efforts are subject to possible ERISA preemption challenge, many reform advocates have urged a narrowing of ERISA preemption.
- Given the pressures already faced by our employer-based system, CIGNA believes this may not be the time to introduce additional state regulation through a relaxation of the scope of ERISA preemption. This is particularly true since the existing regulatory scheme already allows states considerable leeway in this area.

## II. HISTORY AND PURPOSE OF ERISA PREEMPTION

- ERISA's primary goal is to protect the interests of participants and beneficiaries and to make sure plans deliver on their commitments.

- 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.
- Congress also had another goal when it enacted ERISA—to preserve, protect and expand this country’s private, voluntary, employer-provided benefit system.
  - Congress recognized that over-regulating employee benefit plans would encourage employers to respond by decreasing benefits or slowing the formation of new plans.
  - The cornerstone of ERISA’s goal of national uniformity is the law’s federal preemption provision.
- ERISA’s preemption provision expressly preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”
  - ERISA’s preemption provision was intended to preempt the field for federal regulation of employee benefit plans, thereby eliminating the impact of conflicting and costly state regulations. It has been estimated that there are more than 1,900 state mandates that may increase the cost of basic health coverage for non-ERISA plans from less than 20% to more than 50% depending upon the state.
  - ERISA preemption ensures that plans, plan sponsors and participants will be subject to a uniform body of benefits law, and free from varying state regulation that would introduce considerable inefficiencies into plan operations.

### **III. ERISA’S PRESERVATION OF STATE AUTHORITY TO REGULATE INSURANCE**

- Congress carved out an exception to preemption for “any law of any State which regulates insurance.” Commonly known as the insurance “saving clause,” this exception allows states to regulate insurers and the substantive terms of any contracts issued by insurers. There are two exceptions to the saving clause:
  - States cannot create alternative causes of action that have the effect of duplicating, supplementing or supplanting ERISA’s civil enforcement provision, which was meant to be “exclusive.”
  - The saving clause is itself subject to an exception known as the “deemer clause.” This clause exempts self-insured plans from state laws purporting to regulate insurance.
- Thus, if a plan is fully insured, the states may regulate it indirectly through the regulation of its insurer and the insurer’s insurance contracts. If the plan is self-insured, the states may not regulate it.
- The insurance saving clause gives states considerable authority to regulate, albeit indirectly, welfare plans, particularly those of small employers. As of 2006, roughly 59.8 million Americans were covered by insured plans, while about 73 million were covered

by self-insured plans. Statistics indicate that large employers are much more likely to provide coverage through self-insured plans than small employers.

#### **IV. APPLICATION OF ERISA PREEMPTION IN THE WELFARE PLAN ARENA**

- The Supreme Court has indicated that a state law “relate[s] to” plans and is, therefore, preempted by ERISA if it interferes with Congress’s goal of avoiding “a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.”
- Courts have generally held that ERISA preempts state laws that: require employers to establish a plan or provide a specific amount or type of benefit; interfere with core plan administration functions; or intrude upon ERISA’s civil enforcement scheme.
- In *New York State Conference of Blue Cross & Blue Shield Plans, et al v. Travelers Insurance Co., et al (1995)*, however, the Supreme Court made clear that states continue to have broad authority to regulate health care providers, even though such regulation may have an indirect economic impact on ERISA plans.
- The states also continue to have broad authority to regulate insurers and insurance contracts under the insurance saving clause.

#### **V. THE IMPACT OF ERISA PREEMPTION ON STATE “PAY OR PLAY” LAWS**

- Numerous states have enacted, or are considering the enactment, of health care reform legislation to expand coverage to the uninsured and to address other health care quality and cost concerns.
  - Few of these health care reform initiatives have actually been challenged on ERISA preemption grounds.
  - Many of these reforms would likely fall outside the scope of ERISA preemption because they do not “relate to” plans.
- However, state “pay or play” laws and other similar mandates are a notable exception; there is a compelling argument that these laws are preempted because they do “relate to” health care plans. These laws purport to give employers a “choice” between: (1) paying a certain amount for health care benefits for employees, or (2) paying any shortfall to the government.
  - Proponents of “pay or play” laws argue that such laws survive preemption because they do not require employers to establish employee benefit plans or to provide any specific level of benefits through their existing plans, i.e., employers are free to comply by paying any shortfall to the government. Not surprisingly, in states in which health care reform has been attempted or is being contemplated, ERISA preemption has been cited as an impediment.
  - Opponents of “pay or play” laws argue that such laws are no different from mandated benefit laws because they require employers to pay their employees a mini-

mum level of health care benefits or pay a penalty to the state. Further claim that such laws impede employer flexibility in plan design and eliminate the administrative simplicity of national uniformity.

- In *Retail Industry Leaders Assn. v. Fielder* (2007), the Fourth Circuit agreed with “pay or play” opponents, holding that Maryland’s Fair Share Health Care Fund Act was preempted by ERISA. The Maryland law would have required employers with more than 10,000 employees to either spend 8% of payroll on employee health services or pay the shortfall into a state fund.
- The Ninth Circuit may reach a contrary result in a pending action involving San Francisco’s “pay or play” ordinance. The issue stems from the January 2008 stay of a district court decision that permanently enjoined parts of a San Francisco ordinance that established minimum employer health care spending on a per-hour rate, based upon employer size. In its stay, the Ninth Circuit Court held that the city had a “strong likelihood” of succeeding in arguing that its law was not preempted by ERISA. If the Ninth Circuit adheres to this view, there will be a conflict between the Fourth and Ninth Circuits on an issue of national importance, which may eventually be addressed by the U.S. Supreme Court.
- The HR Policy Association, which represents employers, has concluded that the nature of health care benefits offered by multi-state employers makes it unfeasible to reform health care using a patchwork of 50 state solutions. Weakening ERISA’s preemption provision would lead to increased employer costs and, therefore, a further acceleration in the decline of employer-sponsored health care benefits.

## **VI. CONCLUSION**

- ERISA preemption serves the important goal of protecting our employer-based health care system from the inefficiencies and costs inherent in a patchwork scheme of state regulation. This salutary goal is particularly important today given the ever-increasing costs of providing health care.
- Even within the scope of ERISA preemption, the states continue to have broad authority to enact a wide range of health care reforms.
  - ERISA preemption becomes an issue only where a state law effectively requires employers to establish plans or provide a certain level or type of benefit; mandates the structure or administration of plans; or intrudes upon ERISA’s civil enforcement scheme.
  - Under the insurance saving clause, states remain free to regulate insured plans indirectly through laws regulating insurers or insurance contracts.
- Despite the current controversy over state “pay or play” laws, CIGNA strongly believes that ERISA’s preemption provision must be preserved and that there is no justification to destroy a system that has helped to support the health care needs of millions of Americans on a cost-effective and efficient basis.