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Are we ready for Universal Health Care? San Francisco's Universal Health Plan Survive s ERISA Challenge

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San Francisco, California has implemented the very first universal healthcare program in this country, and it thus far has survived a legal challenge brought by the local restaurant industry.

In July 2006, the San Francisco Health Care Security Ordinance (the "Ordinance") was signed into law. It requires covered employers (employers having at least 20 or more employees during any given quarter who engage in business in San Francisco for at least 10 hours per week) to spend a minimum amount per hour per employee on healthcare or, if the employer does not offer healthcare, to contribute to the San Francisco health plan. For businesses with 20 to 99 employees, the current expenditure rate is $1.17 per employee per hour, and for businesses with 100 or more employees, the current expenditure rate is $1.76 per employee per hour. Employers without a health plan must contribute to the San Francisco plan at an expenditure rate of $1.17 per employee per hour. Absent successful legal challenge, the Ordinance would take effect on January 1, 2008 for employers with 50 or more employees, and on April 1, 2008 for smaller employers.

The restaurant industry in San Francisco has been hard hit by the implementation of the Ordinance, and has complained that healthcare plans are particularly onerous to its industry. To that end, the Golden Gate Restaurant Association ("GGRA") filed a challenge to the Ordinance, claiming that the federal Employee Retirement Income Security Act of 1974 ("ERISA") preempted the Ordinance. Section 514(a) of ERISA expressly preempts state laws that "relate to" an ERISA-governed health plan. Specifically, the GGRA argued that the Ordinance's employer spending requirements and recordkeeping mandates amounted to improper regulation of ERISA-governed health plans.

On September 30, 2008, the United States Court of Appeals for the Ninth Circuit refused to hold that ERISA preempted the Ordinance, relying on the United States Supreme Court's presumption against federal preemption concerning matters that generally fall within a state's police powers.

The Ninth Circuit expressly held that, although the Ordinance contains administrative requirements as to employer expenditures and recordkeeping, such obligations exist under the Ordinance regardless of whether the covered employer has an ERISA plan, and the burden is not imposed on the ERISA plan itself. As such, the Ninth Circuit found that the Ordinance did not "relate to" ERISA-governed health plans.

While the Ninth Circuit was careful to note that it was not ruling on the wisdom of the Ordinance, it nonetheless appears to have inserted itself in the political process surrounding the Ordinance by commenting that 20,000 uninsured workers will become covered under the Ordinance, and that "avoidable human suffering, illness, and possibly death will result" if the Ordinance is not upheld.

We note that the GGRA has petitioned the Ninth Circuit for a rehearing *en banc* (i.e., where all the Ninth Circuit judges would examine the case and participate in a decision).

This is not a just an issue for Bay Area residents. California is considering the implementation of a state-wide universal health care program, as are other states and cities outside of California. The GGRA decision, and the ultimate outcome of the ERISA preemption argument rejected by the Ninth Circuit, therefore, will have an effect on the viability of these broader programs.

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