Legal Solutions in Health Reform:
The Role of ERISA Preemption in Health Reform: Opportunities and Limits

EXECUTIVE SUMMARY

INTRODUCTION:
The Employee Retirement Income Security Act (ERISA) is a federal law regulating the administration of private employer-sponsored benefits including health benefits (i.e., health insurance offered by an employer). In general, since the federal government has exercised its authority to preempt state regulation of the administration of private employer-sponsored health plans, states are blocked from enacting laws interfering with ERISA.

As many states pursue health care reform experiments, ERISA preemption becomes relevant as a potential limit on the scope and type of reforms states are able to enact. The dominant trend in ERISA litigation has been to preempt state legislation and litigation interfering with the administration of private employer sponsored health plans, making large-scale state health care reform initiatives difficult. The purpose of this paper is to examine the trajectory of judicial interpretation of ERISA and to discuss what opportunities exist to facilitate health care initiatives given the constraints of ERISA preemption.

RELEVANT LAW – ERISA PRIMER:

ERISA’s Preemption Provisions
- ERISA’s preemption clause preempts all state laws that relate to an employee benefit plan.
- ERISA contains an exception to this preemption rule, referred to as the “savings clause,” that allows state laws to regulate the business of insurance.
- Finally, ERISA (through the “deemer clause”) prevents states from characterizing a self-insured plan as the business of insurance.

ERISA’s Remedial Scheme
- Plan participants may bring a civil action under ERISA against a plan administrator who fails to comply with a request for information about the plan, to recover claimed benefits, to enforce rights under terms of the plan, or to clarify rights for future benefits.
- A plan participant can only recover the amount of the benefits denied.
- ERISA imposes a fiduciary duty on those who make discretionary decisions on behalf of the employee benefit plan. However, courts tend to be very deferential to fiduciaries.

LITIGATION TRENDS:
ERISA litigation takes two general forms: the first involves challenges to state regulation of health plans and insurers, and the second involves challenges to state tort lawsuits for delay or denial of health care. Though the former is more directly relevant to health care reform initiatives, courts have used the same analyses in both litigation areas. While smaller-scale state reforms may survive ERISA preemption, it is an open question as to how the Supreme Court might rule on whether ERISA preempts state pay or play laws.

Challenges to State Regulation of Health Plans and Insurers
State Pay or Play Laws
- The Fourth Circuit held that Maryland’s Wal-Mart Law was preempted because it affected only one company in the state and the law effectively forced Wal-Mart to restructure its health benefit plan to increase coverage.
The Ninth Circuit held that a similar pay or play law enacted in San Francisco was not preempted by ERISA because it applied to multiple types of employers. In addition, and in part because the law applied to employers with and without ERISA plans, employers had an actual choice to either pay into county funds or offer health benefits, unlike the Maryland law.

It is still an open question as to whether or not the pay or play provisions of the Massachusetts Health Care Reform Act of 2006 will be preempted.

**Individual Mandates**

- Individual mandates have not yet been litigated under ERISA, but Courts are unlikely to find that individual mandates bind administrators and dictate plan choices.

**Smaller-scale State Health Care Regulation**

- State laws of general applicability, such as a state law imposing hospital bill surcharges on commercial insurers, are not preempted because their effect on employee benefit plans is indirect and insubstantial.
- State laws that are directed at insurance and that substantially affect the pooling of risk between an insurer and insured are saved, thus not preempted. Such laws include any willing provider laws that prevent a health plan from excluding any health care provider who is willing and able to meet the terms and conditions of plan participation.

**Challenges to State Tort Lawsuits**

- State laws that offer a remedy that supplants ERISA’s exclusive remedial structure, such as a breach of contract action against a managed care organization for denial of coverage or a law imposing a duty on a managed care organization to exercise ordinary care in handling coverage decisions, have generally been found to be preempted.

**POTENTIAL SOLUTIONS:**

The Supreme Court has repeatedly stated that if ERISA preemption is to change, it is Congress’ responsibility, not the Court’s, to do so. There are several ways that the federal government can act:

**Congressional Action**

- Enact ERISA waivers to permit state health reform experiments.
- Amend ERISA to explicitly allow state-based tort litigation against managed care organizations.

**Regulatory Action through Executive Authority**

- The Department of Labor (DOL) could define plan and benefit in ways that expand the relief available under ERISA’s remedial scheme in regulations.
- DOL could publish guidance on valid state options under ERISA.
- DOL could amend regulations on the fiduciary duty obligations to require plan administrators to justify a benefit denial decision with evidence-based medicine.

**CONCLUSION**

ERISA opinions are largely impenetrable, often leading to convoluted legal doctrine. Nobody can easily predict what will be preempted. Yet, there is a certain consistency that emerges over time - the return to preemption as the default option. Given this trend, states must tread carefully in crafting health care reform initiatives that address the crisis of the uninsured without impermissibly burdening private employers’ provision of employee benefit plans.