

An Introduction to ERISA

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Nobody understands me.



I have to admit, you're right, ERISA. You're right.



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What is ERISA?

- Federal law
- Employee Retirement Income Security Act of 1974
- Requires any private employer that establishes an employee pension or welfare benefit plan to meet certain requirements

Why did Congress enact ERISA?

- Uniform regulation over employee benefit plans (protects employers)
- Protect private employee pension plans from fraud and mismanagement (protects employees)
- Encourage employers to sponsor benefit plans for their employees
- Allow employer-sponsored plans to operate independent of potentially differing state laws

What does ERISA regulate?

- All employee pension benefit plans
- All employee welfare benefit plans
 - Established or maintained by employer or union
 - Through purchase of insurance or otherwise
 - Includes medical and hospital benefits, disability benefits, vacation benefits

How does ERISA regulate?

- Requires plans to provide certain information to participants
- Sets minimum standards for participation, vesting, benefit accrual, and funding
- Requires accountability of plan fiduciaries
- Gives participants rights to sue for benefits and for breach of fiduciary duty
- Guarantees payment of certain benefits if defined plan is terminated

ERISA's Preemption Clause

*(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall **supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan** described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.*

29 U.S.C. § 1144(a))

“Savings” Clause

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

29 U.S.C. § 1144(b)(2)(A)

- The savings clause allows the state to regulate traditional insurance carriers conducting traditional insurance business.

Preemption Clause vs. Savings Clause

“The two preemption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general preemption clause broadly preempts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time.”

Metropolitan Life v. Massachusetts, 471 U.S. 724, 739 (1985)

“Deemer” Clause

(B) ***Neither an employee benefit plan*** described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), ***nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.***

29 U.S.C. § 1144(b)(2)(B)

“Deemer” Clause

- Prohibits states from regulating plans that “self-insure” by bearing primary insurance risk
- States cannot “deem” an employee benefit plan to be an insurance company for purposes of regulating it

What is an “ERISA plan”?

- An ERISA plan is any employee welfare benefit plan offered by a private employer or union (except churches), whether:
 - Offered through insurance
 - or**
 - Self-insured
- ERISA plans offered through insurance are subject to state insurance laws; self-insured plans are not

What can states do under ERISA?

- Very little guidance from plain language of statutes
- Most of what we know comes from court cases
- If it hasn't been tested, we just don't know
- Circuit Courts of Appeal split on some issues

ERISA Case Law: U.S. Supreme Court

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)

- State law “relates to” an employee benefit plan if it “has a connection with or reference to such a plan”
- Congress intended preemption to be applied broadly
- States cannot require employers to pay employees specific benefits

ERISA Case Law: U.S. Supreme Court

Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988)

- State laws that are specifically designed to affect employee benefit plans are preempted
- Court struck down Georgia law **excluding** ERISA plan benefits from garnishment
- Court said singling out ERISA plans for different treatment than non-ERISA plans was ERISA violation

ERISA Case Law: U.S. Supreme Court

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133
(1990)

- State law can “relate to” a benefit plan and be preempted even if law not specifically designed to affect those plans or effect is only indirect
- States can require employers to do things (e.g., pay severance benefits), as long as not connected to a plan

ERISA Case Law: U.S. Supreme Court

New York Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)

- Court upheld hospital surcharge imposed on all insurers except Blue Cross Blue Shield
- Court says general presumption against preemption in areas of traditional state regulation, like health care
 - Introduced line of cases finding state laws of general applicability not necessarily preempted
- Indirect influence of surcharge not sufficiently connected to ERISA plans so as to “bind plan administrators to any particular choice” in violation of ERISA preemption clause
- Hinted at possibility that “exorbitant” tax could reach level of no real consumer choice, which might violate ERISA

ERISA Case Law:

Courts of Appeal – “Pay or Play”

Retail Industry Leaders Association v. Fielder, 475 F.3d 180 (4th Cir. 2007)

- U.S. Court of Appeals for the 4th Circuit struck down Maryland’s “Fair Share Act”
 - For-profit employers with 10,000+ employees required to:
 - Spend at least 8% of total payroll on employee health insurance costs, **or**
 - Pay to the state the amount their spending falls short
 - Only Wal-Mart affected
- Clear legislative intent to affect Wal-Mart
- Court said payment amount = penalty/fee, so employer has “irresistible incentive” to increase health benefits
- Majority said employers’ “only rational choice” was to structure ERISA plans to meet minimum spending threshold
- Dissent said no preemption because two options and no preference expressed for one over the other

ERISA Case Law:

Courts of Appeal – “Pay or Play”

Golden Gate Restaurant Association v. City and County of San Francisco, 546 F.3d 639 (9th Cir. 2008)

- U.S. Court of Appeals for the 9th Circuit upheld San Francisco ordinance requiring employers to:
 - Make health care expenditures on behalf of employees, or
 - Make payments directly to city
- Court relied on *Travelers* – while employer might choose to adopt or change ERISA plan instead of making required expenditures, ordinance’s influence on decision “entirely permissible”
- Ordinance can have full force and effect even if no employer has ERISA plan
- Reference to level of benefits not okay; reference to level of payments is okay

How can states waive ERISA?

- ERISA does not contain a waiver provision or otherwise provide for waivers
- Hawaii has specific legislative exemption from ERISA (1983)
 - 1974 – PrePaid Health Care Act
 - Requires employers to provide health coverage for all employees who meet wage threshold
 - No substantive changes allowed
- No other state has exemption

What **can** states do under ERISA?

- Regulate traditional insurers performing traditional insurance functions
(Metropolitan Life v. Massachusetts, 471 U.S. 724 (1985))
- Regulate multiple employer welfare agreements (two or more employers jointly sponsoring health coverage)
(29 U.S.C. § 1144(b)(6)(A))
- Regulate hospital rates charged to insurers and others who pay health care bills
(New York Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995))
- Impose broad-based taxes on employers

What can states *not* do under ERISA?

- Require private employers to offer or pay for insurance
- Directly regulate private employer-sponsored health plans
- Tax private employer-sponsored health plans themselves
- Regulate self-insured private employee plan benefits
- Indirectly affect employer-sponsored health plans by imposing substantial costs on plans

Questions?