



DOL Teams Up with Vermont on the Latest ERISA Preemption Attack

Editor's Note: The following story was recently published on the Self-Insurance World Blog, where SIIA Chief Operating Officer Mike Ferguson offers original reporting and commentary on legislative/regulatory issues affecting companies involved in the self-insurance/alternative risk transfer marketplace. The blog can be accessed on-line at www.self-insuranceworld.blogspot.com

The practice of individual states enacting laws that arguably infringe on ERISA preemption is not new. In fact, some states have become increasingly creative in poking and prodding at the limits of this federal law, which has raised obvious concerns among those involved in the self-insurance marketplace. (See previous blog posts commenting on the Michigan health care claims tax.)

A new twist worth reporting on is the fact that the Department of Labor has apparently decided to take a more hands-on (political) role in shaping the evolving legal landscape, positioning the agency as a powerful accomplice in the effort to make self-insurance a more challenging risk management strategy.

This intent was demonstrated last month by the DOL's decision to file an Amicus brief in the case of Liberty Mutual Insurance Company v. Susan L. Dorgan, in her Capacity as the Commissioner of the Vermont Department of Regulation. The case is currently pending in the United States Court of Appeals for the Second Circuit

At issue is whether Vermont's Health Care Database" statute is preempted by ERISA. Among other things, the statute requires health insurers, providers, facilities and government agencies to "file reports, data, schedules, statistics, or other information determined by the commissioner." The term "health insurer" is defined

broadly to include any administrator of a self-insured group health plans, including third party administrators and pharmacy benefit managers.

The purpose of these requirements is to enable the state to build a comprehensive database it believes is necessary in order to effectively carry out health care administration functions. Liberty Mutual, a self-insured employer, refused to provide the requested data. The company subsequently sued the state, arguing that the collection and reporting of the requested data created administrative burdens for the plans, therefore triggering ERISA preemption.

Siding with the state, a federal trial court judge granted summary judgment, finding that the Vermont law did not affect ERISA plan administration and further concluding that it was appropriate for the state to regulate in this area.

Admittedly, ERISA preemption law can be complicated and highly technical in many cases. In this regard, to be charitable, we suppose that a good faith argument could be made the requirements set forth in this statute do not, in fact, affect plan administration so criticism of the state should be put in proper context – a disagreement on legal and policy grounds.

The DOL's participation is another matter. By putting its large thumb on the scale, an ambitious political agenda is exposed for those who care to notice.


As the agency primarily responsible for administering and enforcing ERISA, DOL has historically defended the law's broad federal preemption provisions. But with its provocative interpretation that Vermont is essentially regulating the business of insurance (the key exception to ERISA preemption), DOL has clearly signaled it has changed course, presumably to support the Administration's implicit objective of squeezing the private

health care marketplace when possible and where few people are watching.

We commented recently that Tom Perez's nomination as secretary of DOL portended a more political agency. Given that he was subsequently confirmed after this Amicus brief was filed, his fingerprints aren't on this one but it can be reasonably concluded that under his watch the DOL will continue to back Vermont if the case is ultimately heard by the U.S. Supreme Court.




And so it goes. A huge federal bureaucracy quietly imposes the Administration's political will in ways too nuanced to attract attention. But that's where the real action is. ■


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