



State-mandated Continuation of Coverage and ERISA Preemption: What Self-funded Employers Need to Know

By Brady Bizarro, Esq.

According to one prominent health law attorney, "Although in its text 'hospital' appears only once and 'physician' not all, ERISA may be the most important law [prior to the Affordable Care Act] affecting health care in the United States." William Sage, "Health Law 2000": The Legal System and the Changing Health Care Market, 15(3) Health Aff. 9 (Aug. 1996). Understanding the intricacies of the Employee Retirement Income Security Act of 1973 ("ERISA") and its preemption clause can be a challenge for even the most assiduous attorney.

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The statute supersedes any and all state laws insofar as they “relate to” any employee benefit plan. It also contains a “savings clause” which preserves the state’s traditional role of regulating insurance. That clause is then qualified by the “deemer clause,” which acts as a kind of escape hatch through the savings clause.

For employers, that escape hatch is key because it allows them to avoid state insurance regulations by self-funding their health plans rather than by purchasing health insurance. Increasingly, however, states are testing the limits of preemption by passing leave laws which mandate that employers continue health insurance coverage for eligible employees out on leave.

Perhaps the best known leave law is the federal Family and Medical Leave Act of 1993 (“FMLA”). The statute, like most other federal laws, applies regardless of the source of insurance. It requires employers to provide twelve weeks of unpaid, job-protected leave for an employee’s own serious health condition, for the birth or adoption of a child, or to care for a spouse, parent, or child with an illness.

Significantly, the law also requires employers to maintain group health benefits for employees who take FMLA leave. Even though this continuation of coverage requirement clearly impacts self-funded ERISA plans, federal laws such as the FMLA are outside the scope of ERISA preemption.

At the state level, five states have now passed laws to address a perceived gap in the FMLA, granting eligible employees paid family leave: California, New Jersey, Rhode Island, Washington, and New York. Rhode Island law requires four weeks of paid leave, California and New Jersey each offer six weeks of paid leave, and Washington offers up to twelve weeks per year. New York’s Paid Family Leave Act (“PFL”), scheduled to take effect on January 1, 2018, offers one of the longest and most comprehensive paid family leave laws in the country.

What makes the PFL unique is not just that it requires employers to provide twelve weeks of paid family leave; it also requires employers to continue health insurance coverage to employees out on leave. While this state-mandated employer obligation would seem to fall squarely under the purview of ERISA preemption, it turns out that determining the scope of ERISA preemption is an arduous task.

The key question to answer is whether the state law at issue “relates to” an ERISA plan. The U.S. Supreme Court has said that a state law “relates to” an employee benefit plan covered by ERISA if it refers to or has a connection with that plan, even if the law is not designed to affect the plan or the effect is only indirect. See, e.g., *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990).

This implies that there is no relevant distinction between obligations imposed on the employer versus on the employee benefit plan for purposes of determining whether ERISA preemption applies. Simply put, state laws which impose obligations on employers, and not specifically plans, may still be preempted. In addition, the Court has held that ERISA does not preempt state laws which have only a tenuous, remote, or peripheral connection with an ERISA plan, as is typically the case with laws of general applicability.

The Court directly addressed ERISA preemption and a state law which mandated the extension of health insurance coverage in *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992). In *Greater Washington*, the Court reviewed a Washington, D.C. law which required employers who provided health

insurance for their employees to provide equivalent health insurance coverage for employees eligible for workers’ compensation benefits.

The Court explained that when a state law specifically refers to benefit plans regulated by ERISA, that provides a sufficient basis for preemption. It made no difference to the Court that the law also related to ERISA-exempt worker-compensation plans or non-ERISA plans. Once it is determined that a state law relates to ERISA plans, this is sufficient irrespective of whether the law also relates to ERISA-exempt plans.

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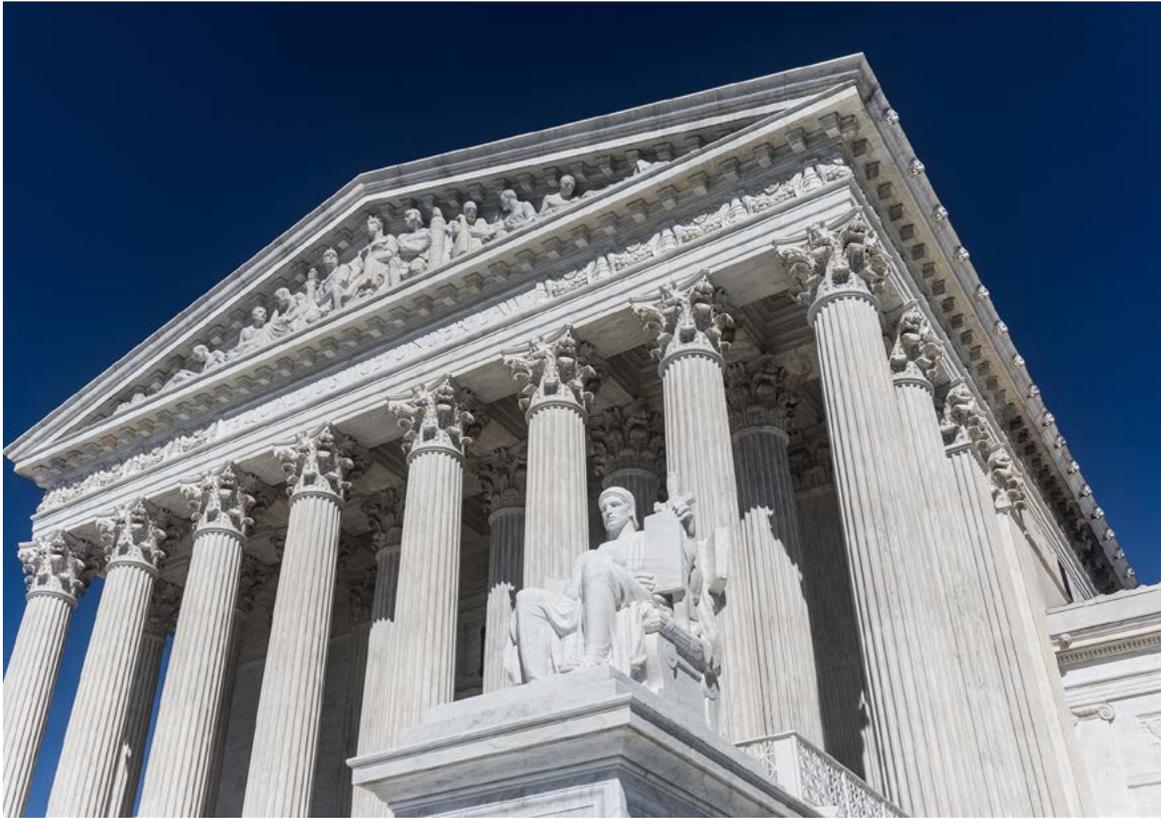
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In earlier cases, petitioners argued that ERISA preemption should be construed to require a two-step analysis: if the state law “related to” an ERISA-covered plan, they argued, it may still survive preemption if employers could comply with the law through separately administered plans exempt from ERISA (making the distinction between a plan requirement and an employer requirement).

See generally *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). In *Greater Washington*, the U.S. Supreme Court dismissed that analysis, stating, “We cannot engraft a two-step analysis onto a one-step statute.” See *Greater Washington*, at 133. Despite the Court’s rulings, the breadth of the “relate to” clause remained unclear and the question of state-mandated continuation of coverage was not directly addressed.

In 2005, the Department of Labor (“DOL”) seemed to put this issue to rest in an advisory opinion on the applicability of leave substitution provisions of the Washington State Family Care Act (“FCA”) to employee benefit plans. The FCA permits employees entitled to sick leave or other paid time off to use that paid time off to care for certain relatives of the employee who had health conditions or medical emergencies.

As part of its analysis, the DOL analyzed section 401 (b) of the FMLA, which provides that state family leave laws at least as generous as the FMLA are not preempted by “this Act or any amendment made by this Act.” 29 U.S.C. § 2651 (b). Further, the DOL cited to a 1993 Senate report which recounts a colloquy between Senators Chris Dodd (D-CT) and Russ Feingold (D-WI). The discussion involved the leave substitution provisions of the Wisconsin FMLA and ERISA preemption.

The record revealed that Senator Dodd, the chief sponsor of the FMLA, remarked, “The authors of this legislation intend to prevent ERISA and any other [f]ederal law from undercutting the family and medical leave laws of States that currently allow the provision of substitution of accrued paid leave for unpaid family leave...”

The DOL relied on this exchange as additional support for the notion that state family leave laws at least as generous as the FMLA (including leave laws that provide continuation of health insurance or other benefits) are not preempted by ERISA or any other federal law.

As a result of the department's guidance, it appeared as if state family leave laws enjoyed special protections from ERISA preemption. In 2014, the Sixth Circuit Court of Appeals considered the same issue and reached the opposite conclusion. In *Sherfel v. Newson*, 768 F.3d 561 (2014), the Court found that the leave substitution provisions of Wisconsin's FMLA sufficiently "related to" an ERISA plan such that they were preempted by ERISA.

Specifically, the Court held that the state law would "mandate the payment of benefits contrary to the [written] terms of an ERISA plan," thus undermining one of ERISA's chief purposes; achieving a uniform administrative scheme for employers. *Newson*, at 564. As part of its analysis of the preemption issue, the Court also dismissed the legislative history relied upon by the DOL in an uncommonly blunt (and borderline satirical) manner:

Considering whether legislators intended to preclude the preemption of state family leave laws by ERISA, the Court observed, "[T]he idea that this colloquy ever passed the lips of any Senator is an obvious fiction. Colloquies of this sort get inserted into the Congressional Record all the time, usually at the request of a lobbyist..." *Newson*, at 570.

By ruling that a state family leave law was preempted by ERISA, the Sixth Circuit Court of Appeals aligned itself with the U.S. Supreme Court's earlier jurisprudence on preemption. It remains to be seen how other Circuit Courts will address similar challenges to state leave laws; especially those that mandate continuation of coverage.



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The conservative approach for employers would be to continue health coverage when required by state law; however, the Sixth Circuit is the highest court to address this issue to date, and self-funded employers would be on solid footing to use ERISA preemption as a shield against state-mandated continuation of coverage.

Paid family leave is one of the few policies in Washington, D.C. that has bipartisan support, and employers should expect to see more states pass laws akin to New York's Paid Family Leave Act. The President explicitly referred to paid family leave in a speech to a joint session of Congress on February 28, and his 2018 budget proposes six weeks of federal paid parental leave. While it remains unclear if that policy will become law, the trend is likely to continue at the state level, and as those laws impact self-funded health plans, the issue of continuation of coverage and ERISA preemption will increasingly attract the scrutiny of the courts. ■

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