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Pay or Play Programs and ERISA Section 514: Proposals for Amending the Statutory Scheme

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Pay or Play Programs and ERISA Section 514: Proposals for Amending the Statutory Scheme

December 16, 2008

ABSTRACT

ERISA section 514 preempts many state and local “pay or play” laws, which mandate employer contributions to their employees’ health insurance. Given the attention that health insurance received in the presidential election cycle, there is a reasonable likelihood of legislative action to achieve a national “pay or play” health care program in the coming years. But a national bill will leave gaps that states and localities may be able to fill – if they were not preempted by ERISA. Therefore, the negotiation of a national health insurance program should address ERISA preemption in order to enable state experimentation. The Article proposes and evaluates a number of options to amend section 514, ranging from targeted statutory changes to federal agency discretion to “de-preempt” state and local pay or play laws.

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INTRODUCTION

Over the last several years, employment law scholars and health care reformers have focused new attention on section 514 of the Employee Retirement Income Security Act (ERISA).¹ Since its enactment in 1974, section 514 – containing ERISA’s broad preemption clause and complicated savings language – has become a case study in unintended legislative consequences.² In 2006, ERISA preemption claimed a new victim: state and local “pay or play” laws, which mandate employer contributions to their employees’ health care.³ Today, states continue to experiment with pay or play schemes designed to avoid ERISA preemption, and lawsuits continue to make their way through the federal courts.

Meanwhile, during the 2008 presidential campaign, all of the major candidates announced a plan to expand Americans’ access to health insurance. On the democratic side, these schemes universally involved nationwide “pay or play” structures, which would require all American employers to contribute to their employees’ health care.⁴ President-elect Barack Obama has already announced plans to make health care reform a priority, even in a struggling economy.⁵ But national legislation will inevitably leave profound gaps in health care coverage – and we should look to states and localities to solve the remaining problems. Of course, absent an amendment to ERISA, many state and local programs will continue to fear preemption and will face severe design constraints.

Therefore, the negotiation of a national health insurance package provides an excellent opportunity to amend ERISA section 514. Scaling back ERISA preemption of state schemes is essential to achieving broad insurance coverage. More importantly, many of ERISA’s important stakeholders – unions, employers, indemnity insurers, and HMOs – will already be at the table to hammer out the particulars of the national health insurance bill. As this window of opportunity opens, this Article discusses the options reformers have for “fixing” section 514 to accommodate state and local schemes.

Indeed, the central aim of this paper is to illustrate how section 514 might be amended in the coming years, but that analysis requires an understanding of the ERISA preemption and its relationship to pay or play laws. Part I begins by briefly tracing the Supreme Court’s ERISA preemption jurisprudence. In Part II, I describe recent state experimentation with pay or play health insurance programs and section 514 preemption of these programs. Finally, Part III describes a number of approaches for amending section 514, illustrating the relative strengths of each approach.

¹ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 29 U.S.C.).

² See, e.g., Peter D. Jacobson, *Health Law 2005*, 33 J.L. MED. & ETHICS 725, 732 (2005) (calling ERISA an “interesting study in the doctrine of unintended consequences”).

³ Retail Industry Leaders Association v. Fielder, 435 F. Supp. 2d 481 (D. Md. 2006).

⁴ See Kaiser Family Found., 2008 Presidential Candidates Health Care Proposals, <http://www.health08.org/sidebyside.cfm> (2008); Kaiser Family Found., Former 2008 Presidential Candidates Health Care Proposals, <http://www.health08.org/Side-By-Side%20DROP%20OUTS%2003.06.08.pdf> (2008)

⁵ See Robert Pear, *Senator Takes Initiative on Health Care*, N.Y. TIMES, Nov. 12, 2008, at A18 (explaining that Obama “still considered health care a top priority, despite the urgent need to address huge problems afflicting the economy”).

I. SUPREME COURT APPROACHES TO ERISA PREEMPTION

A. THE STATUTORY SCHEME

In the main, ERISA provides a comprehensive federal scheme regulating benefits that employers provide to their employees. ERISA make a fundamental distinction between “pension plans,” which provide income to employees after their retirement, and “employee welfare benefit plans,” which offer short-term benefits like health or life insurance to employees, and sometimes retirees as well.⁶ Congress enacted ERISA in response to high-profile scandals involving employee benefits, and the law was intended to ensure employee access to promised benefits while providing a uniform set of federal laws. Logically, then, the Act contains an explicit preemption clause to guide the courts.

In now-infamous language, ERISA subsection 514(a) announces the scope of federal preemption of state law in broad terms: ERISA regulation “shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described [in the Act].”⁷ Interpretation of section 514 has turned on the contours of the phrase “relate to,” and nearly thirty years of jurisprudence illustrate the difficulty of defining the scope of that term.

However, in addition to the broad language of 514(a), subsection 514(b) importantly narrows the law’s preemptive scope. In 514(b)(2)(A) Congress expressly saved from preemption “any State [law] which regulates insurance, banking, or securities.”⁸ Recognizing the potentially broad reach of the preemption language, Congress carved out a few distinct spheres for state regulation. But the next subparagraph, known as the “deemer clause,” limited the extent of the insurance/banking/securities exception. That language declares that no “employee benefit plan described in [ERISA section 403(a)] . . . shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company” that is subject to a state’s insurance, banking, and security regulations.⁹ Put simply, the deemer clause says that if an employee benefit plan does things that make it “look like” an insurance company or a bank, it is nonetheless exempt from state regulation in this area. The most relevant example is large employers who “self-insure” their employees – doing exactly the same thing as health insurer (paying for some but not all employee/enrollee medical expenses), but nonetheless exempt from insurance regulation.¹⁰

In addition to the insurance exemption and deemer clause, section 514 contains a number of other exceptions and clarifications. “[G]enerally applicable criminal laws” are not preempted by the broad language of 514(a), nor are “qualified domestic relations orders” or state tort actions dealing with the recoupment of some funds under Medicaid programs.¹¹ In 1982, Congress added an important exemption applicable only to the State of Hawaii: After the Supreme Court held preempted a Hawaii law that mandated

⁶ See JOHN H. LANGBEIN ET AL., *PENSION AND EMPLOYEE BENEFIT LAW* 89-90 (4th ed. 2006).

⁷ 29 U.S.C. § 1144(a).

⁸ *Id.* § 1144(b)(2)(A).

⁹ *Id.* § 1144(b)(2)(B).

¹⁰ See generally Russell Korobkin, *The Failed Jurisprudence of Managed Care*, 51 *UCLA L. REV.* 457, 486-88 (2003) (discussing the problem of “self-insured employers”).

¹¹ 29 U.S.C. § 1144(b)(4), (b)(7), (b)(8).

employer provision of health insurance,¹² Congress specifically exempted the Hawaiian law from preemption.¹³ The exemption is narrow, however, and only covers the Hawaii law as it existed in 1974, when ERISA was first enacted.¹⁴

Finally, ERISA's broad preemption language is, quite logically, not applicable to plans that are not regulated by ERISA. Section 403(b)(3) of the Act explicitly excludes from regulation any plan "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws."¹⁵ In this provision, Congress recognized that, while some employers voluntarily provided generous benefits related to workplace disability, state governments were actively involved in ensuring a minimum level of protection as part of public-private partnerships in worker's compensation schemes. Thus, ERISA regulation does not apply to plans maintained "solely" to comply with these state law requirements, and the relevant state laws are not ERISA preempted. This "compliance plan" exception is decidedly under-theorized, but is nonetheless a part of the ERISA preemption landscape.¹⁶

With this background in the statutory framework, we turn to ERISA preemption as it has been shaped by the Supreme Court. The discussion briefly illustrates the Court's initial approach, then turns to a description of recent jurisprudence.

B. EARLY PREEMPTION DOCTRINE

The first fifteen years of the Supreme Court's ERISA preemption jurisprudence were characterized by a rather literal interpretation of the phrase "relate to" that rendered preemption of state law "nearly automatic."¹⁷ The Court's first case, *Alessi v. Raybestos-Manhattan Inc.* involved a New Jersey law that prevented employers from reducing pension plan benefits because of a worker's compensation award.¹⁸ A unanimous Court easily concluded that the law was preempted because it affected "method[s] for calculating pension benefits" that were otherwise allowed under the federal scheme.¹⁹ But, foreshadowing decades of unpredictable and oftentimes bizarre jurisprudence, the Court acknowledge that the "relate to" language engendered "some confusion" when the state law at issue affects ERISA plans only indirectly.²⁰

In a 1983 case that would become the foundation for ERISA preemption jurisprudence, the Court in *Shaw v. Delta Airlines* held preempted a state law requiring that employee benefit plans cover pregnancy disability.²¹ The Court expounded on the scope of preemption when state law had an indirect effect on ERISA-regulated subjects,

¹² See *Agsalud v. Standard Oil Co. of Cal.*, 454 U.S. 801 (1981), *summarily aff'g* *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980).

¹³ See Pub. L. No. 97-473(codified at 29 U.S.C. § 1144(b)(5)).

¹⁴ See 29 U.S.C. § 1144(b)(5)(B)(ii).

¹⁵ 29 U.S.C. § 1003(b)(3).

¹⁶ *But see* James E. Holloway, *Revisiting Cooperative Federalism in Mandated Employer-Sponsored Health Care Programs Under the ERISA Preemption Provision*, 8 QUINNIPIAC HEALTH L.J. 239, 268-69 & n.207 (briefly discussing the compliance exemption and listing the handful of relevant cases).

¹⁷ Edward A. Zelinsky, *Travelers, Textualism, and the New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807, 808 (1999).

¹⁸ 451 U.S. 504 (1981).

¹⁹ *Id.* at 505.

²⁰ *Id.* at 523.

²¹ 463 U.S. 85 (1983).

saying, “A law ‘relates to’ an employee benefit plan . . . if it has a *connection with or reference to* such a plan.”²² It is not abundantly clear that “connection with” provides substantially more guidance to lower courts than 514(a)’s “relate to” language, but the “connection with or reference to” test quickly became black letter law.²³ Importantly, the *Shaw* Court acknowledged that a law “may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant” preemption,²⁴ carving out a possible exception to their otherwise broad holding.

Nonetheless, in subsequent cases the Court relied on the “connection with or reference to” standard to conclude that numerous state laws were preempted by the federal scheme. State laws mandating coverage of mental health benefits,²⁵ providing a cause of action for bad faith claim denials,²⁶ regulating benefit plan treatment of tort suit awards,²⁷ and governing benefit provision to worker’s compensation beneficiaries²⁸ were held preempted. A handful of state laws were saved from ERISA preemption, including a generally applicable state garnishment statute²⁹ and a state law requiring one-time severance payments to laid-off workers.³⁰

The Court’s opinion in *Ingersoll-Rand Co. v. McClendon*³¹ is emblematic of their post-*Shaw* jurisprudence. The plaintiff in that case claimed that his employer discharged him only to prevent his pension plan from vesting, which would constitute wrongful termination under state law. The Court held that the state common law claim was preempted by ERISA. The holding reaffirmed the idea that a state law that only indirectly affected an ERISA-plan could nonetheless be preempted. Additionally, the Court emphasized that the state law claim depended on the *existence* of a plan in order to determine liability.³² The state law was not the kind of “generally applicable statute . . . that functions irrespective of . . . an ERISA plan,”³³ because the law only made sense in a world of employee benefit plans. Therefore, even though the state law did not place burdens on plans *qua* plans, and instead imposed burdens on employers who had plans, it was still the kind of state requirement that manifested an inappropriate “connection with or reference to” ERISA.

In sum, under the Court’s initial approach, section 514 broadly preempted state law. Professor Zelinsky has characterized the tortured scope of ERISA preemption,

²² *Id.* at 97 (emphasis added).

²³ See LANGBEIN, *supra* note 6, at 770.

²⁴ *Shaw*, 463 U.S. at 100 n.21.

²⁵ *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985). The Court held that the law at issue “related to” ERISA plans, but was nonetheless saved by the insurance exemption. *Id.*

²⁶ *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

²⁷ *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

²⁸ *District of Columbia v. Greater Wash. Bd. of Trade* 506 U.S. 125 (1992).

²⁹ *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). In a rather ironic holding, the Court applied the “reference to” test to preempt a small portion of the state statute. Georgia, in language clearly designed to avoid ERISA preemption, announced that the law did not apply to a “plan or program subject to ERISA,” but the Court concluded this clause was preempted as an impermissible reference. *Id.* at 829.

³⁰ *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987). The Court held that this one time payment was not a “plan” within the meaning of ERISA.

³¹ 498 U.S. 133 (1990).

³² *Id.* at 139.

³³ *Id.*

noting that state law was preempted “even if such laws ‘are not specifically designed to affect’ ERISA plans, [and] even if the effect . . . ‘is only indirect.’”³⁴ As the cases described above illustrate, ERISA section 514 presented “one of the broadest preemption clauses ever enacted by Congress.”³⁵

C. TRAVELERS AND RECENT JURISPRUDENCE

Throughout the early- and mid-nineties, commentators,³⁶ lower courts,³⁷ and even Supreme Court Justices³⁸ began to express frustration with state of ERISA preemption jurisprudence. By 1995 the Court was prepared to revisit its approach to section 514.

In *New York Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, the Court fundamentally altered its interpretation of section 514.³⁹ Justice Souter’s unanimous opinion admitted some frustration with “uncritical literalism” in applying the “connection with or reference to” test, but did not technically overrule or even limit *Shaw*, *Ingersoll-Rand*, or any of the Court’s prior section 514 decisions.⁴⁰ Nonetheless, *Travelers* is widely understood to have created a “sea change” in ERISA preemption doctrine.⁴¹

At issue in the case was a New York state law that levied surcharges against all payors of hospital bills, except Blue Cross/Blue Shield plans. The law undoubtedly had an indirect effect on employee benefit plans, since their employees’ medical costs were subject to the surcharge if the employer’s ERISA plan self-insured or used conventional insurance, but not if the plan elected Blue Cross/Blue Shield coverage. Yet the Court upheld the New York law. While the surcharge had “an indirect economic effect” on ERISA plans, it did not actually “bind plan administrators” to a particular design choice.⁴² Nor did it “preclude uniform administrative practice”⁴³ since the administrative burden fell to the hospitals, not the plan. Thus, there was no impermissible connection with an ERISA plan in the law.

Subsequent cases generally followed this approach, and in particular picked up on the *Travelers* emphasis on state laws that “bind plan administrators” to particular choices. In *California Division of Labor Standards Enforcement v. Dillingham*, the Court considered a state law affecting apprenticeship programs, which are ERISA plans.⁴⁴ California allowed contractors to pay lower wages to apprentices in state-approved programs, thereby creating an incentive for ERISA apprenticeship programs to seek state approval. The *Dillingham* Court insisted that the state law was no more than an incentive

³⁴ Edward A. Zelinsky, *Travelers, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807, 829 (1999) (quoting *District of Columbia v. Greater Wash. Bd. of Trade* 506 U.S. 125 (1992)).

³⁵ 953 F.2d 543,545 (9th Cir. 1992).

³⁶ See, e.g., Gabrielle Lessard, *Conflicting Demands Meet Conflict of Laws: ERISA Preemption of Wisconsin’s Family and Medical Leave Act*, 1992 WIS. L. REV. 809, 822-23.

³⁷ See, e.g., *Gast v. State*, 585 P.2d 12, 23 (Or. Ct. App. 1978).

³⁸ In a 1992 dissent, Justice Stevens besieged the Court “to take a fresh look” at ERISA preemption. *District of Columbia v. Greater Wash. Bd. of Trade* 506 U.S. 125, 135 (1992) (Stevens, J., dissenting).

³⁹ 514 U.S. 645 (1995).

⁴⁰ *Id.* at 646-47.

⁴¹ *Prudential Ins. Co. of Am. v. National Park Med. Ctr.*, 154 F.3d 812, 815 (8th Cir. 1998).

⁴² *Travelers*, 514 U.S. at 659.

⁴³ *Id.*

⁴⁴ 519 U.S. 316 (1996).

and was not preempted; it did not “bind plan administrators to anything,” nor was it “tantamount to a compulsion.”⁴⁵ In much-quoted language, the Court concluded that the law was permissible, because it “alters the incentives, but does not dictate the choices” of ERISA plans.⁴⁶

The Court’s next ERISA case dealt with a state law that acted directly (as opposed to indirectly) on an ERISA plan. In *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, the Court upheld a New York law that imposed a general tax on health care facilities.⁴⁷ The law was challenged by an ERISA plan that administered its own health care facility subject to the tax. Acknowledging that this law would certainly have “some [direct] effect on the administration of ERISA plans,”⁴⁸ the Court nonetheless concluded that it was not preempted by 514(a). The Court described the statute as “one of myriad state laws of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not relate to them [under section 514].”⁴⁹ In the context of the relevant state statute and the accumulated ERISA jurisprudence, there may be some logic to this formulation. But it makes clear the linguistic absurdity in the post-*Travelers* cases: it is truly remarkable to conclude that a “burden” is “unrelated” to the object that shoulders it.⁵⁰

The Court backed off from its *Travelers-Dillingham-DeBuono* exuberance in subsequent cases. *Egelhoff v. Egelhoff* involved a state law defining the disbursement of nonprobate assets after a divorce.⁵¹ The late Mr. Egelhoff had designated his ex-wife as the beneficiary of an employer-provided (and therefore ERISA-covered) life insurance plan and pension plan. Under Washington state law, the Egelhoff’s divorce terminated her right to this benefit; under the ERISA plan rules, she was entitled to the proceeds. The Court held that the state law was preempted.⁵² Thus, the Court recognized a limit to its tolerance of state laws that indirectly affect ERISA plans.

The description above highlights only a few of the Court’s recent section 514 cases, and it neglects a great deal of nuance in the cases presented. But it does illustrate several themes that are important for understanding preemption of state “pay or play” laws. First, consider the Court’s emphasis on “altering incentives” versus “dictating choices,” which was most clearly articulated in *Dillingham* but has its conceptual origin in *Travelers*.⁵³ Indeed, this formulation of the “test” for ERISA preemption has received a great deal of attention in the legal literature,⁵⁴ including the literature on preemption of

⁴⁵ *Id.* at 332, 333.

⁴⁶ *Id.* at 334.

⁴⁷ 520 U.S. 806 (1997).

⁴⁸ *Id.* at 816.

⁴⁹ *Id.*

⁵⁰ *Cf. Zelinsky, Textualism, supra* note 17, at 808 (deploring ERISA preemption jurisprudence that shows no “regard for the terms of the statute”).

⁵¹ 532 U.S. 141 (2000)

⁵² *Id.* at 147.

⁵³ *Dillingham* at 317, *Travelers*, 514 U.S. at 659 (“An indirect economic influence, however, does not bind plan administrators to any particular choice . . .”).

⁵⁴ *See, e.g.,* Alice T. Armstrong, *ERISA Preemption of Any Willing Provider: The Eighth Circuit Got it Right*, 7 GEO. MASON L. REV. 753, 769-72 (1999); Jeffrey A. Brauch, *Municipal Activism v. Federal Law*, 28 SETON HALL L. REV. 925, 947, 962 (1998); Meridith H. Bogart, *State Doctrines of Substantial Compliance*, 25 CARDOZO L. REV. 447, 465 (2003); Larry J. Pittman, *ERISA’s Preemption Clause: Towards a More Equitable Preemption of State Laws*, 34 IND. L. REV. 207, 214-220 (2001).

pay or play schemes.⁵⁵ Under this approach, state laws are evaluated based on the extent to which they coerce, rather than merely incentivize, ERISA plans in order to promote desired outcomes.

But a second theme, less prominently articulated but similarly originating in *Travelers*, also underlies these cases – the locus and nature of the administrative burden associated with state law is important. Thus, in *Travelers* the Court emphasized that the New York’s hospital surcharge law did not interfere with “uniform administrative practice for ERISA plans.”⁵⁶ The law’s administrative burden instead fell to hospitals, not to an ERISA-covered entity. In *Egelhoff*, Justice Thomas built on this theme, emphasizing that the impermissible law required ERISA plans themselves to make changes to comply with the Washington law.⁵⁷ Clearly, that action might impair national uniformity.⁵⁸ In this view, state laws are evaluated on the extent to which they actually “touch” ERISA plans, regardless of whether those touches are “coercive.” Indeed, this sort of analysis begins to look more like traditional field and conflict preemption jurisprudence, and focuses attention on the effect that fifty unique state regimes might have on a federally-regulated entity.⁵⁹

Finally, these cases underscore that the “connection with or reference to” framework survived the *Travelers* revolution. *Travelers*, *Dillingham*, *DeBuono*, and *Egelhoff* all open by affirming this approach.⁶⁰ Thus, while *Shaw*’s “nearly automatic” approach to preemption is no longer good law, section 514 cases still develop quite deliberately by looking for “connections” and “references.” Moreover, much of the pre-*Travelers* thinking is still reflected and cited.⁶¹ For this reason, cases like *Ingersoll-Rand* are relevant to the preemption landscape, even if their precise interpretative approaches no longer reflect the Court’s thinking.⁶²

II. PREEMPTION OF STATE PAY OR PLAY SCHEMES

With this background in the jurisprudence of ERISA preemption, we can begin to understand why most state laws requiring employers to provide employee health benefits are preempted. This Part discusses the interaction between section 514 and the seven existing “pay or play” laws that have been enacted by states and localities across the country. Section II.A first describes pay or play health care reforms, highlighting some of their most important features. Section II.B then addresses ERISA preemption of these

⁵⁵ See Amy B. Monahan, *Pay or Play Laws, ERISA Preemption, and Potential Lessons from Massachusetts*, 55 KAN. L. REV. 1203 (2007); Edward A. Zelinsky, *The New Massachusetts Health Law: Preemption and Experimentation*, 49 WM. & MARY L. REV. 229 (2007) [hereinafter Zelinsky, *Massachusetts*].

⁵⁶ *Travelers*, 514 U.S. at 660.

⁵⁷ *Egelhoff*, 532 U.S. at 150-51.

⁵⁸ *Id.*

⁵⁹ Justice Scalia and Justice Ginsburg, in a pair of concurring opinions, have called upon the Court to do exactly this – abandon much of the section 514(a) jurisprudence, and hold that the statute’s preemptive scope is precisely congruent with traditional field and conflict preemption. *Id.* at 152 (Scalia, J., concurring); *Dillingham*, 519 U.S. at 334 (Scalia, J., concurring).

⁶⁰ See *Travelers*, 514 U.S. at 623, *Egelhoff*, 532 U.S. at 149, *Dillingham*, 519 U.S. at 323.

⁶¹ See generally Robert N. Covington, *Amending ERISA’s Preemption Scheme*, 8 KAN. J.L. & PUB. POL’Y 1 (1999) (“Is there really a new order under ERISA? Answer: ‘Yes, BUT . . .’”).

⁶² See, e.g., *Egelhoff*, 532 U.S. at 149-50 (citing *Ingersoll-Rand* for the proposition that fifty dissimilar state laws would pose too steep an administrative burden on ERISA plans).

laws by analyzing the cases in which courts have considered pay or play laws, and the handful of schemes that have not been challenged.

A. "PAY OR PLAY"

Health care regulation has long been an area of state dominance in America's federalist system, and in the last two decades states have taken the lead in broad health care reform efforts.⁶³ States have developed a number of approaches to expand their citizens' access to health care, including public-private partnerships to develop insurance purchasing pools, and creative leveraging of public funds in the Medicaid and SCHIP programs.⁶⁴ But by far the most drastic, comprehensive, and thoroughly-criticized approaches have been state "pay or play" laws. Under pay or play health care reform, employers are given two options: either they can "pay" a state tax that subsidizes health care for the uninsured, or they can "play" by providing their employees with health insurance coverage.⁶⁵ President Clinton's proposed Health Security Act, also called an employer mandate, was a variation on the pay or play scheme.⁶⁶

Pay or play programs vary along several dimensions. The two most important types of differences are: 1) the type of employer actions that qualify as "playing," and 2) the severity of the required payment should an employer choose to "pay." For instance, the state of Massachusetts and the city of San Francisco have both recently adopted pay or play schemes, which take nearly opposite approaches to the burdens they place on employers.⁶⁷ In Massachusetts, employers "play" in a very specific way: offering "a group health plan . . . to which the employer makes a fair and reasonable premium contribution."⁶⁸ San Francisco, on the other hand, deems an employer in compliance with its requirements if it spends more than \$1.76 per employee-hour on any of a variety of health related costs, including participation in private health insurance, contributions to health savings accounts, or reimbursing employees directly for health expenditures.⁶⁹ But while Massachusetts' sets a high bar for employer action, if the employer elects not to cover its employees, it must pay a fee of no more than \$300 per employee per year to the state.⁷⁰ San Francisco, meanwhile, requires employers to pay the full \$1.76 per hour (or \$3660 per year for a full time employee) into a city fund dedicated to the provision of health care.⁷¹

⁶³ See, e.g., Eleanor D. Kinney, *Clearing the Way for an Effective Federal-State Partnership in Health Reform*, 32 U. MICH. J.L. REFORM 899 (1999); Arthur Birmingham LaFrance, *Healthcare Reform in the United States: The Role of the States*, 6 SEATTLE J. FOR SOC. JUST. 199, 199 (2007).

⁶⁴ See AMANDA BRODT ET AL., STATE OF THE STATES: BUILDING HOPE RAISING EXPECTATIONS 20-27 (2007) (discussing various reform initiatives).

⁶⁵ See PATRICIA A. BUTLER, NAT'L ACAD. STATE HEALTH POLICY, REVISITING PAY OR PLAY: HOW STATES COULD EXPAND EMPLOYER-BASED COVERAGE WITHIN ERISA CONSTRAINTS 4 (2002) (defining "pay or play").

⁶⁶ See Kevin Fickenschler & David Kindig, *Elements of the American Health Security Act of 1993*, PHYSICIAN EXECUTIVE, Nov.-Dec. 1993 (describing the pay or play aspects of the Health Security Act).

⁶⁷ See generally 2006 Mass. Acts 58, San Francisco Health Care Security Ordinance, Ord. § 14.1-14.8 (2007)

⁶⁸ 2006 Mass. Acts 58(c)(2).

⁶⁹ San Francisco Health Care Security Ordinance, Ord. § 14.1.

⁷⁰ 2006 Mass. Acts 58.

⁷¹ San Francisco Health Care Security Ordinance, Ord. § 14.1.

Nor does this exhaust the scope of variation on these themes. One recently enacted pay or play law considers only employers' *total* spending on health expenditures, without regard to the expenditure on particular employees – thus allowing an employer to “play” by making year end deposits in a handful of employees’ health savings accounts.⁷² Others have counted employers’ charitable contributions to community clinics towards their health care expenditures.⁷³ And the payment requirements are no more uniform. They vary not only in magnitude, but also in structure. Some are assessed as a tax,⁷⁴ and others as a fine.⁷⁵ Massachusetts bases its payment on the employers’ “share” of the state’s uncompensated care fund, and that share is calculated based on employees’ actual individual utilization of free care.⁷⁶ Thus, pay or play should be conceptualized as a general framework for involving employers in health care funding, which affords governments wide latitude to define program requirements.

To date, seven different state and local laws embodying pay or play requirements have been enacted. The Massachusetts and San Francisco programs described above are the highest profile excursions into pay or play laws. Vermont has also implemented a plan, similar to the Massachusetts program, requiring employers to cover employees or pay a \$365 “assessment” per employee per year.⁷⁷ In 2006, Maryland made headlines with its so-called “Wal-Mart law,” officially known as the Fair Share Act, which required private employers with 10,000 or more employees to spend 8% of their total payroll on health insurance.⁷⁸ Though the statutory language targeted all large employers, in practice, Wal-Mart was the only covered employer who was not making an adequate contribution to employee health care. Also in 2006, two New York counties – Suffolk County and New York City – adopted local pay or play statutes, requiring large retail stores to make health care contributions. Finally, in 1974 Hawaii enacted the country’s first pay or play program, which requires employers to pay one half of their employees’ health insurance costs.⁷⁹

B. ERISA PREEMPTION OF PAY OR PLAY PROGRAMS

Despite nascent state experimentation in pay or play schemes, these state programs are exposed to a tremendous risk of ERISA preemption. Some observers have flatly concluded that it is “hard to envision significant state experimentation with medical coverage that does not run afoul” of ERISA’s preemption clause,⁸⁰ and that “all [employer coverage] mandates are preempted by ERISA.”⁸¹ Indeed, despite the Court’s somewhat relaxed post-*Travelers* approach, it is fairly clear that state attempts to mandate

⁷² See MD. CODE ANN., LAB. & EMPL. §§ 8.5-102.

⁷³ See, e.g., Retail Industry Leaders Ass’n v. Suffolk County, 297 F. Supp. 2d 40 (2006).

⁷⁴ See HAW. REV. STAT. ANN. § 393-2 (Michie 1999).

⁷⁵ See N.Y.C. Admin. Code. § 22-506

⁷⁶ See 2006 Mass. Acts 58. The statute also caps the required contribution at \$300.

⁷⁷ State of Vermont Agency of Administration, Overview of Vermont’s Health Care Reform, http://hcr.vermont.gov/sites/hcr/files/Revised_Vermont_HCR_Overview_October_08__0.pdf (last visited Nov. 1, 2008).

⁷⁸ Md. Code. Ann., Lab. & Empl. § 8.5-103(a).

⁷⁹ Standard Oil Co. v. Agsalud, 633 F.2d 760, 760 (1980).

⁸⁰ See Zelinsky, *Massachusetts*, *supra* note 54, at 286.

⁸¹ Michael H. Bernstein & John T. Seybert, *You Can’t Get There from Here: Erisa Preemption of State Laws Mandating Employer Healthcare Contributions*, 3 ABA HEALTH ESOURCE (2007), <http://www.abanet.org/health/esource/Volume3/07/bernstein-seybert.html>.

employer health insurance programs generally constitute impermissible governance of employee benefit plans.

Courts have addressed ERISA preemption of four of the seven state and local statutes described above. Laws in Suffolk County and Maryland have been held ERISA preempted,⁸² and the Supreme Court's holding that Hawaii's law was preempted led to a special congressional exception.⁸³ An ERISA challenge to San Francisco's program was recently decided by the federal courts; in the only ERISA opinion that has been favorable to a pay or play law, the Ninth Circuit held that the law survived ERISA preemption.⁸⁴ New York City's law has not been challenged and remains on the books, but has not been enforced due to conflict between the mayor and city council regarding the permissibility of the statute under ERISA.⁸⁵ Meanwhile, the Massachusetts and Vermont laws have not been subject to judicial review and are currently being implemented.

As we saw above, the Court's ERISA preemption jurisprudence has been anything but coherent. State laws are "related to" ERISA if they have a "connection with or reference to" an ERISA-governed plan, but applying that test in the context of pay or play laws is not straightforward. Therefore, it is useful to trace a number of themes that appear in the pay or play cases: exploring the dictated choices versus altered incentives framework, locating administrative burdens, and relying on the existence of an ERISA plan. These themes repeatedly appear in the reported opinions that have considered ERISA preemption of pay or play laws, and the laws that have escaped preemption challenges are vulnerable along the same dimensions.

1. Choices and Incentives

The Court's first foray into ERISA preemption declared that states had no place in creating employee entitlements under state law: "That the private parties, not the Government, control the level of benefits is clear from the statutory language."⁸⁶ Attempts to shape benefits levels constitute an impermissible "connection" with ERISA-governed subject matter. Post-*Travelers*, the federal courts have attempted to define exactly what it means for a state statute to "control the level of benefits," and they have largely settled on the test articulated in *Dillingham*, distinguishing between laws that "alter[] the incentives" and laws that "dictate the choices" of ERISA plans.⁸⁷ Until recently, this framework has not been charitable to pay or play laws.

Perhaps the best example of how this test has been applied to relevant state laws appears in the Fourth Circuit and district court's discussion of the Maryland "Wal-Mart" statute. In that case, Maryland insisted that the law did not "mandate" that employers

⁸² See *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007), *aff'g* 435 F. Supp. 2d 481 (D. Md. 2006) (Maryland); *Retail Industry Leaders Ass'n v. Suffolk County*, 297 F. Supp. 2d 40 (2006) (Suffolk County).

⁸³ See HAW. REV. STAT. ANN. § 393-2 (Michie 1999) (Hawaii's pay or play law); *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981) (holding the statute ERISA preempted); 29 U.S.C. § 1144(b)(5)(B)(ii) (2000) (creating an exception to ERISA preemption for Hawaii).

⁸⁴ *Golden Gate Restaurant Ass'n v. San Francisco*, 2008 WL 4401387 (9th Cir., Sept. 30, 2008).

⁸⁵ See N.Y.C. Admin. Code. § 22-506. The official codification notes that the law's validity is "currently a subject of disagreement between the mayor and the city council." See N.Y. State Legislature, *Laws of New York*, 2008, <http://public.leginfo.state.ny.us/> (follow the link to "Laws of New York," then the link to "ADC," then navigate to Title 22, Section 506).

⁸⁶ *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981).

⁸⁷ *Dillingham*, 520 U.S. at 334.

provide benefits under an ERISA plan, because employers had a choice between spending at least 8% of their payroll on health benefits, or spending less than 8% and paying any difference as an assessment to the state.⁸⁸ In this view, the law was merely a *Dillingham*-like incentive, encouraging but not requiring employers to take certain actions with respect to ERISA-governed plans. Both courts unequivocally rejected this view. The district court described the statute as providing a “Hobson’s choice,” since there was not “a single reason why the employer would pay the state.”⁸⁹ The Fourth Circuit continued, “The only rational choice employers have . . . is to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold.”⁹⁰

Courts have also relied on legislative intent in crafting pay or play statutes, focusing on legislative sponsors’ statements regarding the consequence of the law. A court reviewing the Suffolk County statute emphasized legislators’ hope that the statute would force “Wal-Mart and the big box stores” to offer health benefits.⁹¹ Similarly, the Fourth Circuit insisted that supporters “understood the [Maryland Fair Share] Act as *requiring* Wal-Mart to increase its healthcare spending.”⁹² Thus, even though these pay or play statutes technically offer employers a “choice,” courts have based their ERISA inquiry on the general goals underlying the pay or play statutes. Indeed, one observer has advised legislators seeking to avoid ERISA preemption to explicitly “remain neutral regarding whether employers offer health coverage or pay the tax” in order to prevent preemption.⁹³ Thus, attempts to achieve coverage expansions through pay or play programs are often ERISA preempted because they do not offer employers a meaningful choice between “paying” and “playing.”

It is particularly instructive to consider this issue in the context of the Massachusetts and Vermont reform legislation, which have yet to be challenged on ERISA grounds. Recall that both laws require employers to make a “reasonable” contribution to precisely defined employee health care benefits, or pay a relatively small “assessment” or “fee” to the state – less than \$400 per employee per year.⁹⁴ Recent estimates suggest that it costs nearly \$4,500 to provide annual health insurance for a single employee;⁹⁵ therefore, it may be easier for a court to conclude that these statutes actually do offer a choice to employers and ERISA plans. Indeed, Professor Monahan recently concluded that Massachusetts’ requirements “survive preemption [because] there is a relative modest financial disincentive” associated with paying rather playing.⁹⁶

⁸⁸ See Retail Industry Leaders Ass’n v. Fielder (*Fielder I*), 435 F. Supp. 2d 481, 497 (2006)

⁸⁹ *Id.*

⁹⁰ Retail Industry Leaders Ass’n v. Fielder (*Fielder II*), 475 F.3d 180, 193 (2006).

⁹¹ See Retail Industry Leaders Ass’n v. Suffolk County, 297 F. Supp. 2d 403, 407-08 (2006).

⁹² *Fielder II*, 475 F.3d at 194.

⁹³ See PATRICIA A. BUTLER, NAT’L ACADEMY FOR STATE HEALTH POLICY, REVISITING PAY OR PLAY: HOW STATES COULD EXPAND EMPLOYER-BASED COVERAGE WITHIN ERISA CONSTRAINTS 6-7 (2002) http://www.nashp.org/Files/ERISA_pay_or_play.PDF. It is noteworthy that this advice was given *before* the decisions described above.

⁹⁴ See 2006 Mass. Acts 58; State of Vermont Agency of Administration, Overview of Vermont’s Health Care Reform, http://hcr.vermont.gov/sites/hcr/files/Revised_Vermont_HCR_Overview_October_08__0.pdf (last visited Nov. 1, 2008).

⁹⁵ See Kaiser Family Found., Employer Health Benefits 2007 Annual Survey (2007), <http://www.kff.org/insurance/7672/index.cfm>

⁹⁶ Amy B. Monahan, *Pay or Play Laws, ERISA Preemption, and Potential Lessons from Massachusetts*, 55 U. KAN. L. REV. 1203, 1216 (2007).

While this approach may seem plausible, in fact, Professor Zelinsky and others have illustrated that the modest assessment does not immunize these laws from ERISA preemption.⁹⁷ For these statutes do not simply require states to spend a certain amount on health care or pay a much smaller fee to the state. Instead, they require employers to provide health benefits that meet certain substantive standards if they wish to avoid paying the fee. In this way, then, pay or play laws “regulat[e] the substance of ERISA plans” in an impermissible way.⁹⁸ Indeed, the laws “dictate the choices” by “expressly regulat[ing] employers and the type of benefits they provide employees.”⁹⁹ In other words, the Massachusetts and Vermont statutes may offer employers a choice between paying and playing. But for employers who do choose to offer health benefits, the laws impermissibly “dictate” the way in which the benefit must be provided.

Thus, pay or play statutes will often “dictate the choices” and therefore manifest an impermissible “connection” with ERISA plans. They go too far towards shaping the way employers provide benefits to employees – either by creating too stiff a penalty for failing to offer health benefits, or by impermissibly regulating how employers structure their benefits.

2. Administrative Burden

Another aspect of the “connection with” test that has survived, and even flourished, post-*Travelers* is an inquiry into the administrative burdens associated with the state law. In the clearest expression of this argument, the *Egelhoff* Court emphasized that administrative uniformity was one of ERISA’s “principal goals,” and courts should thus be skeptical of any law that places administrative burdens on ERISA plans.¹⁰⁰ Of course, by forcing employers to comply with substantive or minimum spending requirements in the provision of health benefits, pay or play statutes create administrative burdens that are at the “core” of ERISA preemption.¹⁰¹ The laws force employers and ERISA plans to alter their benefit structures in order to either spend a certain amount on health care expenditures or comply with substantive regulations, and these alterations impede the “uniform administrative scheme” that ERISA allegedly envisions.¹⁰² Administrative complexity underlay the Court’s concern about the Hawaii pay or play statute – in a subsequent ERISA case the Court observed that “if Hawaii could demand the operation of a particular benefit plan, so could other States, which would require that the employer coordinate perhaps dozens of programs.”¹⁰³ Indeed, courts and observers have gone beyond the structural burdens imposed by pay or play laws, and concluded that even the recordkeeping requirements associated with these laws constitute an impermissible administrative burden.¹⁰⁴

The administrative complexity question has taken on particular significance in the context of pay or play laws enacted by cities and counties, including the Suffolk County and San Francisco statutes. The New York district court emphasized that the Suffolk

⁹⁷ See, e.g., Zelinsky, *Massachusetts*, *supra* note 54; Bernstein & Seybert, *supra* note 81.

⁹⁸ Zelinsky, *Massachusetts*, *supra* note 54, at 257.

⁹⁹ *Agsalud*, 630 F.2d at 766.

¹⁰⁰ *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001).

¹⁰¹ *Fielder I*, 435 F. Supp. 2d at 495.

¹⁰² *Egelhoff*, 532 U.S. at 148 (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)).

¹⁰³ *Fort Halifax*, 482 U.S. at 12-13.

¹⁰⁴ See *Golden Gate I*, 535 F. Supp. 2d 968, 974 (N.D.Cal.2007), Zelinsky, *Massachusetts*, *supra* note 54.

County law “would require that Wal-Mart make a different expenditure for employees in Suffolk County” and would thus “inhibit the administration of a uniform plan nationwide.”¹⁰⁵ Similarly, “if the expenditure requirements of the [San Francisco] Ordinance were not considered preempted by ERISA, employers would necessarily have to keep an eye on the minimum health care spending requirements in each locality,” and the California district court considered this too great a responsibility.¹⁰⁶ But even in the context of the Maryland law, which applied only to very large employers and operated statewide, the courts found that the law impermissible interfered with plan administration.¹⁰⁷ The Massachusetts and Vermont laws arguably impose even greater administrative burdens because they regulate substantive aspects of the benefit plan, not just total expenditures.

In sum, under the current jurisprudence pay or play statutes may violate ERISA’s prohibition on state laws that have a “connection with” ERISA governed plans. Because they seek substantive changes in employer-provided health care benefits, pay or play laws go to the “core” of ERISA preemption analysis by creating unacceptable administrative burdens that interfere with “nationally uniform plan administration.” Furthermore, as we shall see in the next Subsection, pay or play statutes also rely on the existence of an employee health plan, and are therefore often preempted based on this “reference to” ERISA-governed entities.

3. The Existence of an ERISA Plan

In *Ingersoll-Rand*, the Court called attention to state laws that are premised on the “existence” of an ERISA plan,¹⁰⁸ concluding that a statute that would not function in the absence of ERISA-governed benefits was, in effect, an impermissible “reference to” a covered plan. The *Dillingham* Court reiterated this theme, condemning statutes “where the existence of ERISA plans is essential to the law’s operation.”¹⁰⁹ Despite tortured state attempts to avoid assuming the existence of ERISA plans, pay or play programs invariably run afoul of this requirement.

Pay or play laws, by definition, require the state or municipality to determine if an employer has made a statutorily adequate contribution to employee health care. Certainly, a state law which defined its requirements in terms of ERISA’s “employee welfare benefit plans” would be preempted because it specifically “references” and assumes the “existence” of ERISA entities. However, as states have taken more creative approaches to defining what constitutes “playing,” courts have taken a more functional approach to preemption. For example, laws that require employers to spend a fixed amount on “employee health care” also include a long definition of qualified health care expenses, which include ERISA and non-ERISA expenditures. Maryland included Health Savings Accounts (HSAs) and on-site employee health clinics,¹¹⁰ while Suffolk County also included employers’ charitable contributions to local community health

¹⁰⁵ Retail Industry Leaders Ass’n v. Suffolk County, 497 F. Supp. 2d 403, 418 (2006).

¹⁰⁶ Golden Gate Restaurant Ass’n v. San Francisco, 535 F. Supp. 2d 968, 970 (N.D.Cal.2007), *overturned*, 2008 WL 4401387 (9th Cir., Sept. 30, 2008)

¹⁰⁷ Retail Indus. Leaders Ass’n v. Fielder, 475 F.3d 180 (4th Cir. 2007).

¹⁰⁸ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

¹⁰⁹ Cal. Div. Labor Standards & Enforcement v. *Dillingham Construction, Inc.*, 519 U.S. 316.

¹¹⁰ See 2005 Md. Laws 3 (codified as amended at MD. CODE ANN., HEALTH-GEN. § 15-142 (LexisNexis 2007)); MD. CODE ANN., LAB. & EMPL. §§ 8.5-101 to 107 (LexisNexis 2006).

centers.¹¹¹ The Fourth Circuit dismissed the HSA and on-site clinic approaches, observing that they “simply would not be a serious means” by which employers would choose to comply with the statute.¹¹² In reviewing the Suffolk County statute, the district court similarly found that it was “unreasonable” to expect employers to contribute to a community health center in place of an employee health plan, thus the statute relied on the existence of, and therefore impermissibly referenced, ERISA plans. The California district court nicely summarized this approach, focusing on the “undeniable fact that the vast majority of any employers’ healthcare spending occurs through ERISA plans.”¹¹³ In this view, any state law that attempts to assess health expenditures necessarily references ERISA plans. Given courts’ functional approach to the “reference to” portion of the preemption inquiry, most pay or play statutes impermissibly depend on ERISA spending in order to determine employer liability.

4. *The Ninth Circuit’s Opinion in Golden Gate Restaurant Ass’n*

As described above, most courts addressing the issue have held that pay or play statutes are barred by ERISA. The only exception is a 2008 decision in the Ninth Circuit, concluding that San Francisco’s pay or play statute was not preempted.¹¹⁴ In that opinion, Circuit Judge Fletcher overturned a lower court decision holding the statute preempted by ERISA. He also offered a detailed analysis of the program, which required employers to spend \$1.76 per hour per employee, or \$3500 per year for full time employees.

The court first concluded that the San Francisco law did not require employers to create an ERISA plan, which would be a clear violation of section 514.¹¹⁵ Petitioners argued that an employer’s payments to the city would be considered an ERISA-covered welfare benefit plan, or, alternatively, that the city administered program into which the employer was paying was itself an ERISA plan.¹¹⁶ Holding that the administrative duties required if an employer chose to the pay city hardly amounted to a “plan,” and that the city program was an entitlement not a welfare benefit plan, the court easily rejected these arguments.¹¹⁷

The court then turned to the petitioners more plausible argument that San Francisco’s law had an impermissible “connection with” employer’s ERISA-covered plans.¹¹⁸ Quoting extensively from *Travelers* and emphasizing that the law did not “bind plan administrators to any particular choice,” the court rejected this assertion.¹¹⁹ Judge Fletcher did not focus on the ways in which the statute might influence employers’

¹¹¹ See *Industry Leaders Ass’n v. Suffolk County*, 297 F. Supp. 2d 40, 42-43 (2006) (describing the Suffolk County law).

¹¹² *Retail Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180, 196-97 (4th Cir. 2007).

¹¹³ *Golden Gate Rest. Ass’n v. San Francisco (Golden Gate I)*, 535 F.Supp.2d 968, 970 (N.D.Cal.2007), *overturned*, 2008 WL 4401387 (9th Cir. Sept. 30, 2008).

¹¹⁴ *Golden Gate Restaurant Ass’n v. San Francisco (Golden Gate III)*, 2008 WL 4401387 (9th Cir. Sept. 30, 2008). This decision followed an earlier 2008 opinion in which Judge Fletcher stayed the district court’s decision overturning the statute. *Golden Gate Restaurant Ass’n v. San Francisco (Golden Gate II)*, 513 F.3d 1112 (2008).

¹¹⁵ *Golden Gate III*, 2008 WL 4401387, at *8.

¹¹⁶ *Id.* The first argument was advanced by the employers; the second, by the Department of Labor.

¹¹⁷ *Id.* at *10, *12.

¹¹⁸ *Id.* at *15.

¹¹⁹ *Id.*

decisions about whether or not to adopt ERISA-covered health plans, which had been at the heart of the Fourth Circuit’s analysis of this issue.¹²⁰ Instead, the Ninth Circuit highlighted the fact that the San Francisco statute had only a minimal impact on employers’ decisions about what to do *inside* their health insurance plans. San Francisco did not require or encourage particular forms of coverage, and in that respect “the influence exerted by the [San Francisco] Ordinance is even less direct than the influence in *Travelers*.”¹²¹ More broadly, because San Francisco only cared about the level of payment, not the type of benefits, there was no preemption. The court also rejected the claim that the law’s administrative burdens manifested an impermissible “connection” to the ERISA plans by placing substantial requirements on record-keeping within the plans. Relying on Ninth Circuit precedent, Judge Fletcher insisted that the burdens fell “on the employer rather than on an ERISA plan” and were thus irrelevant to the preemption inquiry.¹²²

Finally, the Ninth Circuit considered whether San Francisco’s statute made a “reference to” ERISA plans. Using the *Ingersoll-Rand* test, which looks to a statute’s reliance on the “existence of an ERISA plan,” the court concluded that the law did not assume the existence of ERISA-governed benefits.¹²³ Indeed, the opinion eschewed the functional inquiry described above, and instead concluded simply that employers could pay the tax to the city, and therefore the statute could “have its full force and effect even if no employer in the City has an ERISA plan.”¹²⁴ Furthermore, to the extent the San Francisco law “referenced” anything, it was a permissible “reference to the *payments* provided by the employer to a ERISA plan,” and not an impermissible “reference to the level of *benefits* provided.”¹²⁵

Judge Fletcher’s analysis is certain to draw scrutiny, and some have argued that it would not withstand Supreme Court scrutiny.¹²⁶ Yet, even if the Ninth Circuit’s reasoning is durable, the core conclusion is that San Francisco’s law is permissible because it looks at nothing more than the dollar value of employers’ health care expenditures. This reasoning gives state and local governments only the bluntest tool with which to craft health care reform, and does not enable a broader array of experimentation. As a simple example, states may wish to expand their safety net health care services for youth, while creating soft employer incentives to cover their employees’ children.¹²⁷ Similarly, Massachusetts’s pay or play law explicitly requires a “group health plan” and would undoubtedly be impermissible under this approach.

¹²⁰ *Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180 (4th Cir. 2007). The Ninth Circuit distinguished the Fourth Circuit precedent by emphasizing the fact that under the San Francisco law, benefits actually could accrue to employers who chose to pay, rather than play, which was not the case under Maryland’s Wal-Mart law. *Golden Gate III*, 2008 WL 4401387, at *18-20.

¹²¹ *Golden Gate III*, 2008 WL 4401387, at *15.

¹²² *Id.* at *16.

¹²³ *Id.* at *18.

¹²⁴ *Id.* at *16.

¹²⁵ *Id.* (emphasis added).

¹²⁶ See, e.g., Sharon Jacobs, *Ninth Circuit Gives San Francisco’s Health Care Security Ordinance the Green Light (For Now)*, 36 J.L. MED. & ETHICS 431, 433 (2008).

¹²⁷ During the 2007 negotiations over the State Children’s Health Insurance Program (SCHIP), CMS issued a letter outlining the terms that states would have to meet if they wanted to expand coverage to “less poor” children. One of the terms mentioned in that letter included steps to prevent employers from dropping

Nor is the problem limited to the pivot points in the Ninth Circuit's analysis. In the seven statutes described above, legislators have gone to absurd lengths in their attempts to survive preemption. The Maryland legislature thought it could escape ERISA preemption by including expenditures on "workplace clinics" as a qualified health care cost. Yet it is difficult to imagine that encouraging employers to provide free Band-Aids and cough syrup ought to be a crucial component of the health care reform agenda. Suffolk County chose to include employer contributions to local community health centers, but, again, mandated corporate charity hardly seems like a solution to the insurance crisis in America. And Massachusetts believed it had to cap the employer payment at less than 10% of the cost of health insurance, which will ultimately limit the effectiveness and may jeopardize the solvency of their project. In other words, states are engaged in legislative contortions to escape ERISA preemption, and courts have regularly concluded that even that is not enough.

If state and local pay or play laws are going to be a viable component of the health care reform landscape, governments must be able to avoid these absurdities and confidently design pay or play programs to meet their legitimate health care needs. Therefore, it is important to amend ERISA section 514, giving states the freedom to realistically explore their options, balance incentives, and creatively design programs. The next Part considers options for amending the statute, particularly in the context of a national health care initiative.

III. AMENDING ERISA

Despite extensive discussion of the difficulties associated with ERISA preemption jurisprudence, very little attention has been paid to the contours of a potential legislative change to section 514. Even within the growing body of literature addressing state pay or play laws and ERISA preemption, little has been said about how the federal statute might be amended. However, as a window of reform opportunity opens, it is imperative to have solutions on the table. Therefore, this Section discusses a number of approaches, exploring ways to restructure statutory preemption and allow state and local health insurance reform to flourish.

This conversation is particularly timely, as serious discussion about national health care reform resume for the first time in nearly fifteen years. National legislation may impose some type of federal mandate requiring employer health insurance contributions,¹²⁸ but it may also create, exacerbate, or simply ignore problems that states can tackle through their own programs. There will undoubtedly be gaps in the categories of employers and employees included in the federal reform, and in the type of care covered. A prolonged phase-in period or a broad set of exceptions will open further chasms. States will need to mediate the relationship between any federal programs or mandates and Medicaid and other safety net programs. A truly comprehensive program is simply not on the horizon, and there remains an important role for states to play.

coverage for employees' children, yet any state law that complied with this term would almost certainly risk ERISA preemption.

¹²⁸ Amol Navathe et al., *Barack Obama's Plan for a Healthy America*, CONTEXT, POLICY & PRACTICE (2008), http://www.contextjournal.org/category5.php?article_id=369

Furthermore, negotiations surrounding health care reform provide an ideal legislative vehicle.¹²⁹ The conversations will undoubtedly involve state and local governments, employers, unions, and insurance companies – all key actors in the ERISA landscape.¹³⁰ This moment, then, provides a unique opportunity to amend ERISA to allow state and local governments to experiment with their own health care reform agendas.

In general, there are three different policy paths that would achieve this result. First, federal legislation could drastically alter the preemption clause and eliminate most of the current jurisprudence by repealing the “relate to” language in its entirety. Second, section 514 could be amended to carve out a narrower exception that would permit state pay or play laws, but would, in some other respects, leave the preemption scheme largely intact. As discussed below, this could take a number of forms, relying on existing components of the statute to craft an exception. Finally, broad and continuing “relate to” preemption could be supplemented by special exceptions – legislative or administrative – for particular state laws.

Before turning to these options, it is useful to briefly recall the structure of ERISA section 514, the preemption clause. Subsection 514(a) contains the infamous “relate to” language, while subsection 514(b) contains a laundry list of exemptions from preemption – the insurance/banking/securities exception and the associated “deemer clause,” the special exception for Hawaii’s employer mandated health insurance law, and many others. Subsection 514(c) provides definitions, while subsections (d) and (e) deal specifically with unrelated preemption issues.¹³¹

A. REPEALING “RELATE TO”

Perhaps the most obvious approach is to simply abandon subsection 514(a)’s “relate to” language. Following this path, courts would be left to apply traditional field and conflict preemption principles to determine the permissibility of state laws affecting employee benefits plans. The “connection with or reference to” test in its various iterations would be discarded, and the post-*Shaw* jurisprudence would be obsolete.

Justices Scalia and Ginsburg, in two concurring opinions, have asked the Court to accomplish this result on its own through a narrow construction of the 514(a) language.¹³² As Scalia explained in *Dillingham*:

I think it would greatly assist our function of clarifying the law if we simply acknowledged that our first take on this statute was wrong; that the “relate to” clause of the pre-emption provision is meant, not to set forth a *test* for pre-emption, but rather to identify the field in which ordinary *field pre-emption* applies—namely, the field of laws regulating “employee benefit plan[s].”¹³³

¹²⁹ See generally JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (Harper Collins 2d. ed. 1995).

¹³⁰ If the failed 1994 health care reform debates taught anything, it is the importance of bringing all stakeholders to the table early on.

¹³¹ 28 U.S.C. 1144. Subsection d reiterates that no federal law is preempted and subsection e ensures that automatic contribution laws are not prohibited by the states.

¹³² *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001) (Scalia, J., concurring); *Cal. Div. Labor Standards & Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 334 (Scalia, J., concurring).

¹³³ *Dillingham*, 519 U.S. at 336 (citations omitted).

It is perhaps conceivable that the Court could overrule nearly three decades of ERISA holdings, and Scalia has had some success in convincing Justices Breyer and Stevens of the merits of this argument.¹³⁴ However, given the norm of strong statutory stare decisis and Congress's repeated reliance on the Court's current approach,¹³⁵ specific legislative action seems like a much more appropriate reform tool. Congress could replace the existing "relate to" language in subsection 514(a) with text that clearly indicates the intent Scalia describes. For instance, the statute might be amended as follows:

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 that conflict with or otherwise impede the operation of this subchapter, subchapter II of this chapter, or subchapter III of this chapter.~~¹³⁶

One might argue that it would be better to simply repeal section 514, leaving ERISA without an express preemption clause, and relying on the courts to apply field and conflict preemption on their own. However, such an approach creates serious problems given the exceptions to preemption carved out in subsection 514(b) and the other preemption guidance appearing in subsections 514(d) and (e).¹³⁷ Indeed, despite the confusing "relate to" language, other parts of ERISA preemption clause offer sensible instructions and should be left intact. Therefore, it is wise to use an amended subsection 514(a) to set a general tone for preemption and allow the remainder of the statute to build around that.

Still this approach poses significant drawbacks. To begin, ERISA plans have legitimate concerns regarding administrative uniformity. In a labor market that is increasingly freed from geographic limitations, the administrative costs of complying with myriad state and local laws could be tremendous. Field preemption principles would provide some limit to state regulation, especially within a statute that clearly evinces the need for administrative simplicity,¹³⁸ but there would undoubtedly be tremendous uncertainty. Furthermore, uncertainty itself is an important drawback to this approach. Preemption jurisprudence is notoriously unpredictable. Inviting a new generation of state law in a field that has been largely closed to state regulations for more than thirty years will cause confusion. On balance, these drawbacks may be outweighed by a legislative conclusion that "relate to" preemption was a failed experiment, but it is important to explore more limited alternatives.

¹³⁴ See *Egelhoff*, 532 U.S. at 536 (Breyer, J., dissenting) ("Like Justice Scalia, I believe that we should apply normal conflict pre-emption and field pre-emption principles where, as here, a state statute covers ERISA and non-ERISA documents alike.")

¹³⁵ See generally Richard Soriano, *Why We Need a Patient's Bill of Rights*, 24 J. HEALTH POL. POL'Y & L. 1137 (1999).

¹³⁶ See 29 U.S.C. § 1144(a).

¹³⁷ *Id.* at § 1144(b), (d)-(e).

¹³⁸ See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.").

B. A STATUTORY SPACE FOR PAY OR PLAY

Rather than eliminating “relate to” and all of the associated jurisprudence, it may be more feasible or more desirable to simply carve out a narrower exception that allows states to experiment with pay or play statutes. There are three potential ways to create such an exception – bifurcating subsection 514(a) to separate pension plans and welfare benefit plans, expanding the insurance/banking/securities exception in subsection 514(b), or expanding the “compliance plan” exception. Each of these approaches is discussed below.

1. Pensions Plans & Welfare Benefit Plans

First, recall that ERISA regulates two very different types of employee benefits – pension plans, and welfare benefit plans. Pension plans provide post-retirement income to former employees, and therefore require a complex set of rules governing how benefits accrue and vest over the course of an employee’s career. Indeed, ERISA’s 1974 enactment was motivated by the desire to create comprehensive national standards to ensure that pension funds were sustainably and fairly administered, and to provide a federal guarantee of pension plan’s solvency.¹³⁹ Welfare benefit plans, on the other hand, include temporary benefits like health insurance and life insurance. While there was certainly some perceived need for federal regulation in this area, the substantive provisions of ERISA place far fewer burdens on welfare benefit plans than they do on pension plans.¹⁴⁰

Yet, section 514’s preemption scheme applies equally to pension and welfare benefit plans. While the Third Circuit has insisted that it is unlikely “that Congress intentionally created this so called ‘regulatory-vacuum’ in which is displaced state law regulation of welfare benefit plans while providing no federal substitute,”¹⁴¹ Professor Conison has offered a convincing account of the origins of this approach.¹⁴² Conison argues that Congress was primarily concerned with fiduciary issues like pension plan vesting and funding, but the inclusion of welfare benefit plans in the broad preemption language was nonetheless intentional.¹⁴³ In particular, a 1974 state court ruling in Missouri affecting welfare benefit plans and subjecting them to state insurance regulation¹⁴⁴ sensitized ERISA’s drafters to the “potential for state interference with the proposed law.”¹⁴⁵ Thus, Congress was aware of the impact that subsection 514(a) would have on state regulation of welfare benefit plans, and deliberately elected such an approach.

Despite congressional intent, however, it is relatively easy to build a case for treating state regulation of pension plans and welfare benefit plans differently. Imagine an employee who begins a twenty year career with a single employer in Ohio, spends fifteen years working in Michigan, and transfers to Florida eighteen months before retirement. When this employee retires, disparate pension regulations in Ohio, Michigan,

¹³⁹ LANGBEIN ET AL., *supra* note 6.

¹⁴⁰ *See* LANGBEIN ET AL., *supra* note 6, at 90-92.

¹⁴¹ DeFelice v. Aetna, 346 F.3d 442 (3d Cir. 2003).

¹⁴² Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U. L.Q. 619 (1994).

¹⁴³ *See id.* at 646-650.

¹⁴⁴ State ex rel. Farmer v. Monsanto Co., 517 S.W.2d 129, 133 (Mo.1974).

¹⁴⁵ Conison, *supra* note 142, at 648.

and Florida could cause profound uncertainty and conflict over the terms of his pension benefits, creating a strong imperative for federal preemption. However, when the employee seeks an annual physical under his employer-sponsored health insurance in Ohio, Michigan, or Florida, there is no conflict.¹⁴⁶ His health benefits are only subject to the regulations of one state at a time, and his transfer out of Michigan terminates any effect that Michigan law might have on his coverage.

Following this logic, subsection 514(a) could be amended to apply broad “relate to” preemption to pension plan benefits, but not employee welfare benefit plans. New language might read:

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 *pension* benefit plan described in section ~~1003(a)~~ 1002(2) of this title and not exempt under section 1003(b) of this title.

With no explicit preemption language affecting ERISA’s welfare benefit plans, traditional field and conflict preemption principles would apply. Functionally, this approach may be indistinguishable from an effort to remove the “relate to” language from the statute entirely. All of the major ERISA preemption cases have considered laws that allegedly “relate to” welfare benefits, not pensions, and the supremacy of the comprehensive federal scheme in pension benefit regulation is largely undisputed. Nonetheless, approaching preemption reform in this way might be more palatable to key ERISA stakeholders, including employers and plan administrators.

It is important to distinguish this approach from the “reasoned textualism” approach to preemption under the current statute that has been advocated by Professor Zelinsky.¹⁴⁷ Zelinsky focuses attention on the distinction between pension and welfare benefit plans, but it does so in order to draw the preemption analyses closer together, rather than to separate them from one another. In particular, a “reasoned textualist” approaches preemption as follows:

[I]f ERISA affirmatively regulates a particular facet of pension plans (e.g., the employees who must be covered by such plans), the combination of section 514 and ERISA's silence on that subject as to welfare plans consigns that subject to employer autonomy. Thus, as to a state law impacting upon the substance of welfare plans, the Court should ask whether such law intrudes upon the zone of employer autonomy defined by reference to ERISA's regulation of pension plans. If the challenged state law intrudes upon the zone of employer autonomy so defined, the law is ERISA-preempted and the zone thereby preserved from state as well as federal regulation.¹⁴⁸

In other words, the “relate to” language is used to broadly define the field of regulation occupied by ERISA with respect to welfare plans. If Congress chose to regulate an aspect of pension benefits, but left welfare benefits unregulated in that area, then any state law touching on welfare benefits in that way must be ERISA preempted. On the other hand, if the state law affects an aspect of welfare benefit plans for which Congress is also silent with respect to pension benefits, the law is permissible. Such an

¹⁴⁶ Cf. LANGBEIN ET AL. *supra* note 6 (providing a similar example).

¹⁴⁷ See Zelinsky, *supra* note 34.

¹⁴⁸ *Id* at 840.

approach, whatever its merits, undoubtedly leaves most state pay or play laws preempted.¹⁴⁹ These laws mandate employer contributions to certain benefit plans and therefore impermissibly affect employer action. By contrast, the approach described above detangles pension and welfare benefit plan preemption, focusing the inquiry only on the way in which Congress separately regulates each type of benefit, and creates broader space for pay or play legislation.

2. Insurance/Banking/Securities Exception

The approach described above, while technically leaving the “relate to” language partially intact, still creates a tremendously large exception for state regulation of all welfare benefit plans. A narrower change to ERISA’s preemption language might focus more specifically on state regulation of employers’ health insurance benefits. A logical approach begins with subsection 514(b)(2)’s insurance/banking/securities exception. This language allows states to “regulate[] insurance, banking, or securities,” but with one important caveat – no ERISA-covered plan shall *itself* be subject to state regulation of insurance, banking, or securities.¹⁵⁰ That is, states can regulate the insurance plans that ERISA welfare benefit plans purchase, but not the welfare benefit plans themselves. This limitation, known as the “deemer clause,” has created a surprisingly large loophole, allowing employers to “self insure” rather than purchase insurance products, thus exempting them from state insurance regulation. Without digressing too far into the health insurance and HMO controversies of the late 1990s and early 2000s, it is worth noting that ERISA and its deemer clause played a central role in states’ early inability to effectively regulate HMOs in the face of consumer complaints.¹⁵¹ The proposed federal “Patients Bill of Rights” was one reaction to this gap in regulation, but subtle, post-*Travelers* changes in ERISA jurisprudence eventually alleviated some, but certainly not all, of this tension.¹⁵² This conflict undoubtedly lies in the background of any attempt to rework subsection 514(b)(2).

Nonetheless, carefully targeted modifications could extend this statutory language to include pay or play statutes. Combined with changes to section 514’s definitional section, the subsection could be amended as follows:

(b) Construction and application (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, *or which requires provision of health care benefits*. (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

¹⁴⁹ See *id.* at 845-846 (discussing *Washington Board of Trade*); see also Zelinsky, *Massachusetts*, *supra* note 54.

¹⁵⁰ See 29 U.S.C. § 1144(b)(2).

¹⁵¹ See LANGBEIN, *supra* note 6.

¹⁵² See Robert N. Covington, *Amending ERISA’s Preemption Scheme*, 8 KAN. J.L. & PUB. POL’Y 1 (1999).

any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies. . . .

(c) Definitions. For purposes of this section . . . (3) *The term “health care benefits” shall include benefits provided under an employee benefit plan described in section 1003(a) of this title, only insofar as those benefits affect the protection or maintenance of a beneficiary’s health or wellness.*

This language allows states to do two things. First, they can require that employers make minimum health care expenditures or provide a minimum guarantee of health care coverage. This sort of revision does indeed create a broad safe harbor for pay or play laws, allowing broad and creative state experimentation. At the same time, this language also reaches a very different kind of state regulation. Under the proposal, states can require that employers cover certain benefits, like pregnancy or vaccinations – requirements that have long been applied to stand alone insurers, but that self-insured employers have been able to avoid through ERISA’s deemer clause.¹⁵³ While this is certainly a controversial expansion of state’s regulatory power, this approach creates a sensible and congruent expansion of state’s ability to regulate health care benefits.

The language above does include important limitations on states’ new authority. First, the proposed language exempts only state laws that “require the provision of” health benefits, not laws which “regulate” those benefits, thus limiting the extent to which states can affect plan conduct. Furthermore, the proposed revision leaves the actual text of the deemer clause intact, even while neutralizing some its effects. Nonetheless, under this scheme, self-insured employers continue to be exempt from state regulations affecting the “business” of health insurance (e.g., solvency requirements),¹⁵⁴ and state are only able to reach the substantive content of self-insured health plans in the same way that they regulate stand alone insurance. At the same time, the definitional language in subsection 514(c)(3) could be narrowed, perhaps excluding mental health benefits and eschewing the controversial debate over mental health parity (e.g., “protection or maintenance of a beneficiary’s *physical* health or wellness”), or otherwise limiting the scope of the exception. Finally, note that the language applies only to states, not localities, and schemes like the one in San Francisco would continue to risk ERISA preemption.

Yet even with these built-in limitations, it may not be feasible to couple savings language affecting pay or play statutes with more general state regulation affecting health benefits. In that case, there is a third approach that would extend an even narrower safe harbor to certain kinds of pay or play statutes. As discussed below, this proposal does not rely on an amendment to section 514, and instead proceeds from the “compliance plan” exception in ERISA’s general definitional section.

3. Compliance Plan Exception

Broadly speaking, not all kinds of employee benefits are regulated under ERISA. State laws affecting benefits that are unregulated are therefore not preempted, for they do

¹⁵³ LANGBEIN, *supra* note 6, at 770.

¹⁵⁴ Regulation on the “business” of health insurance includes provisions creating minimum asset requirements or creating fiduciary responsibilities, exactly the sort of regulation ERISA was meant to preempt.

not “relate to” any ERISA-governed subject matter.¹⁵⁵ Leveraging this feature of the statute relies on amending ERISA so that benefits provided to comply with state pay or play laws are not considered regulated employee welfare benefits. While this may seem improbable, given that health insurance benefits are a central ERISA-governed welfare benefit plan, the Act does open up a narrow opportunity for action.

Subsection 403(b)(3), known as the “compliance plan” exception, provides:

(b) The provisions of this subchapter shall not apply to any employee benefit plan if . . . (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws[.]¹⁵⁶

This language leaves the states free to design workers compensation and state unemployment benefit schemes, with mandated employer contributions, without risking ERISA preemption. State pay or play laws could potentially be worked into this framework, though the result would necessarily limit the form of state regulation. Following this approach, subsection 403(b)(3) could be amended to read as follows:

(b) The provisions of this subchapter shall not apply to any employee benefit plan if . . . (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws, ~~or~~ unemployment compensation or disability insurance laws, *or mandated health care contribution laws*[.]

Under this exception, states could design stand alone “health care contribution” laws and require employer provision of benefits without coming under ERISA’s umbrella. However, this sort of state scheme would look very different from the pay or play laws that states have recently enacted. Note that the exception applies only to plans that are maintained “solely” to comply with relevant state laws. Pay or play laws, on the other handed, have tended to look to employer contributions under existing ERISA-covered health care benefit plans. If state-based health care reform is going to escape preemption through the compliance plan exception, then new forms of pay or play laws will need to be developed.

The Massachusetts health care reform statute suggests one design that may be effective. Under that law, employers who choose to “pay” are not assessed a fixed per-employee fee, but are instead required to compensate the state for a percentage of the uncompensated health care sought *by their employees*.¹⁵⁷ A statute that placed a similar assessment on employers across the state could be designed so that contributions were funneled into a plan “maintained solely for compliance.” Thus, while not technically creating a pay or play requirement, this approach would accomplish the same result, since individuals generally seek uncompensated care only if they lacked employer-provided insurance.

Approaching pay or play preemption in this way has tremendous practical advantages – it creates a narrow exception that only reaches a very specific kind of statute. Yet it also drastically limits how states design their reform programs, potentially placing off-limits many innovative public-private partnership approaches providing

¹⁵⁵ See generally 29 U.S.C. 1144(a) (preempting state laws that “relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) [ERISA section 403(b)] of this title”) (emphasis added).

¹⁵⁶ 29 U.S.C. 1003(b).

¹⁵⁷ See 2006 Mass. Acts 58.

expanded access to health insurance. By requiring that pay or play statutes operate from an employer benefit that exists “solely” to comply with state law, new regulation might arguably be more disruptive by requiring the establishment of new kinds of benefits.

C. CASE BY CASE DE-PREEMPTION

None of the narrow approaches described above are entirely satisfactory – the more expansive safe harbors may be impossible to enact and may risk intolerable uncertainty, while the more limited approaches may be too restrictive to allow effective state experimentation. Similarly, repealing the “relate to” language may prove unwise or insurmountably challenging. The third potential policy path, case by case de-preemption of particular state laws, certainly does not escape from these concerns. Instead, it may recombine the trade-offs in a different way, thus creating an alternative set of opportunities for reformers.

This Section describes two somewhat related tools for achieving such “case by case de-preemption,” where federal actors evaluate particular state and local pay or play laws and exempt them from ERISA preemption at their discretion. It begins by describing a purely legislative approach based on ERISA’s exception for the state of Hawaii, and then explores how this approach might be modified in light of the Clean Air Act’s scheme for establishing fuel economy standards for consumer vehicles. It then sketches the outline of a more comprehensive and flexible scheme based on federal agency discretion.

1. *The Hawaii Route*

In 1974, shortly before ERISA was enacted, Hawaii’s state legislature passed the Prepaid Health Care Act of 1974, effectively requiring employers to pay at least 50% of the cost of their employees’ health care costs.¹⁵⁸ The Hawaii statute reaches beyond even the most ambitious proposals in the modern debate, covering any employee working more than 20 hours a week, and capping employee contributions to insurance premiums at 1.5% of their salary.¹⁵⁹ In a 1980 decision that was affirmed by the Supreme Court per curiam, the Ninth Circuit held the statute preempted by ERISA.¹⁶⁰ Two years later, after an aggressive campaign by Hawaii’s congressional leadership,¹⁶¹ Congress amended ERISA’s preemption clause to specifically exclude the Hawaii statute.¹⁶² The exception only extends to the statute as crafted in 1974, and does not allow Hawaii to modify its program in anyway.¹⁶³ Therefore, Hawaii employers are still required to comply with the state’s broad health care coverage mandate; however, any other state attempting to replicate the program would face almost certain ERISA preemption.

¹⁵⁸ HAW. REV. STAT. ANN. § 393-2 (Michie 1999).

¹⁵⁹ *Id.*; see also Sylvia A. Law, *Health Care in Hawaii*, 26 AM. J.L. & MED. 206, 206-207 (2000) (attributing Hawaii’s broad coverage to numerous factors, including decades of Democratic political control and the state’s unique cultural legacy).

¹⁶⁰ *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff’d. mem.*, 454 U.S. 801 (1981).

¹⁶¹ Shelley K. Hubner, *State Pay or Play Employer Mandates*, HEALTH LAW., Aug. 2008, at 15, 19.

¹⁶² See 29 U.S.C. § 1144(b)(5)(B)(ii) (2000).

¹⁶³ See *id.*

Some have argued that Massachusetts should explore a similar legislative exception for its own health care reform program.¹⁶⁴ While the state's program has not been challenged in federal court, and observers continue to argue that the law is effectively tailored to escape ERISA preemption, the threat of preemption litigation still hangs over administration of the state law. A statutory exception like Hawaii's would eliminate this concern, and may be achievable in the current congressional climate. Of course, given Massachusetts's tortured efforts to escape ERISA preemption – limiting employers' assessments to \$300 per year, and tracking employer data for uncompensated care patients – it would be ironic to find that these compromises were moot. More importantly, a Hawaii-like provision would lock Massachusetts into its current program design, flying in the face of rhetoric touting the program as an experiment in need of tinkering and modification.¹⁶⁵ And, perhaps most significantly, an exception for the state of Massachusetts would do nothing to promote pay or play programs in San Francisco, Vermont, and other states and cities contemplating reform. In fact, a legislative exception for Massachusetts would actually undermine the argument that other programs were not ERISA preempted.

Some of these concerns can be better understood by looking to an entirely unrelated area of federal law: the Clean Air Act's Corporate Average Fuel Efficiency (CAFE) Standards, governing fuel efficiency standards for automakers.¹⁶⁶ In 1970, Congress created the first federal standards for consumer automobiles. In the process, legislators were forced to grapple with the fact that California had already adopted its own more stringent standards for cars sold within its boundaries.¹⁶⁷ The compromise that emerged allowed California to keep its own standards, and to amend those standards subject to approval by the Environmental Protection Agency.¹⁶⁸ Furthermore, other states were free to adopt the California standards if they chose; they could not, however, create their own fuel economy standards.¹⁶⁹

By analogy, imagine how the ERISA preemption scheme could adopt some of these features. The statute could be amended to, first, de-preempt the Massachusetts law, second, give Hawaii and Massachusetts the option of seeking federal approval for changes to their statutes, and third, allow other states to adopt wholesale the Hawaii or Massachusetts programs. But even this brief thought experiment exposes profound flaws with such an approach in the context of health care reform. To begin, fuel efficiency standards create a single-variable regulatory scheme and the core cost-benefit calculation is clear: the cost of dirtier air against the expense of more efficient cars. Pay or play statutes, on the other hand, are comprehensive programs that involve dozens, or even

¹⁶⁴ David A. Hyman, *The Massachusetts Health Plan: The Good, the Bad, and the Ugly*, 55 U. KAN. L. REV. 1103, 1110 (2007). The same logic certainly applies to programs in Vermont, San Francisco, and other places.

¹⁶⁵ See David A. Hyman, *The Massachusetts Health Plan: The Good, the Bad, and the Ugly*, 55 U. KAN. L. REV. 1103 (2007).

¹⁶⁶ See 42 U.S.C. § 7543(a), (b) (2000).

¹⁶⁷ See Patrick Parenteau, *The State Tackle Climate Change with Little Help from Washington*, 40 CONN. L. REV. 1453 (2008).

¹⁶⁸ Until recently, EPA approval was largely considered a rubber-stamp process, and the EPA had never denied a waiver to California. See *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (discussing the EPA's recent decision to deny California's application for a change in CAFE standards).

¹⁶⁹ 42 U.S.C. § 7543(a) (2000).

hundreds, of decision points and weigh a seemingly infinite array of interests. An either/or system in this context is difficult to justify. Additionally, in the context of CAFE standards, California has some non-arbitrary claim to special status because it has the market power to insist on unique regulation.¹⁷⁰ No similar logic applies in the health care reform debate; Hawaii and Massachusetts are only advantaged because of their first-mover status, and there is no reason to think that these programs would work well in other states.¹⁷¹ Finally, in the health care context, this approach would largely eliminate the broad and creative experimentation that is needed to find meaningful health care reform options.

Indeed, none of this is to suggest that the CAFE model should be seriously explored in the context of ERISA reform. But it does highlight an alternative to the statutory reforms discussed in the preceding Section, which attempt to define a specific sandbox in which state legislatures can create pay or play structures. Instead, there are models in the modern administrative system that begin by preempting state law, but nonetheless allow states to advance their own regulatory interests on a federally-controlled playground. The next Subsection explores a different, more apt analogy in administrative law, and uses that to trace an approach for amending ERISA section 514.

2. *A Role for Federal Agencies*

A more workable model would provide states a flexible way to seek ERISA de-preemption of health care reform legislation. Starting with a presumption of today's broad (though somewhat uncertain¹⁷²) ERISA preemption of state pay or play statutes, states could apply to a federal agency, which would then review their program and grant an exception from preemption. Such a system would give states, and perhaps localities, the ability to design flexible programs, while allowing a federal actor to assess the administrative burden placed on employers. Thus, Massachusetts's comprehensive and carefully administered statewide reform program could be treated differently than the haphazard New York City law applying only to employers with more than 100,000 square feet of retail grocery sales.¹⁷³ Moreover, employers would be provided with clear notice of any non-federal law that may affect their provision of health care benefits, arguably lessening the administrative complexity for multi-state employers.

In fact, a 1976 Food and Drug Administration (FDA) statute, the Medical Devices Amendments (MDA),¹⁷⁴ operates in a very similar way. The statute provides a comprehensive federal regulatory scheme for medical devices, and in broad language preempts any state law governing the "safety or effectiveness" of a regulated device.¹⁷⁵ However, the statute also provides that the FDA may exempt state laws from preemption,

¹⁷⁰ See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 768 (2008). Were Nebraska to attempt similar legislation, one could imagine that automakers would simply refuse to sell cars in the state.

¹⁷¹ See Sidney D. Watson, *The Road from Massachusetts to Missouri*, 55 U. KAN. L. REV. 1331 (2007) (explaining

¹⁷² Cf. *Golden Gate Restaurant Ass'n v. San Francisco*, 2008 WL 4401387 (9th Cir., Sept. 30, 2008) (constituting the only decision upholding a pay or play law).

¹⁷³ See N.Y.C. Admin. Code. § 22-506.

¹⁷⁴ See 21 U.S.C. § 360k (2000).

¹⁷⁵ *Id.* § 360k(a)(2) (2000).

“[u]pon application by the state or political subdivision” and review by the agency.¹⁷⁶ Today, the *Code of Federal Regulations* contains a long list of exempted state laws.¹⁷⁷ Like the fuel efficiency standards compromise, this legislative scheme was born of an era when states entered a regulatory field before the federal government, and legislators were forced to design a system that would allow federal supremacy while accommodating existing state law.¹⁷⁸

There are a number of unresolved questions and substantial problems with using this approach to create an ERISA de-preemption scheme. First, which agency would be responsible for administering the program? ERISA largely falls under the purview of the Department of Labor, but that agency has very little special expertise about the complex issues affecting employer provision of health care. Some might even argue that the Department’s own engagement in ERISA cases is at least partly responsible for today’s complicated ERISA jurisprudence.¹⁷⁹ Another choice might be the Center for Medicare and Medicaid Services (CMS), an office within the Department of Health and Human Services that is responsible for assessing state compliance with the federal Medicaid statute.¹⁸⁰ States are accustomed to seeking CMS approval for changes to their Medicaid programs,¹⁸¹ and pay or play reforms are often coupled with expansion or alterations to the state’s health care safety net services.¹⁸² Thus, states may already be working with CMS to obtain approval for their reform legislation, and expanding that process to cover ERISA de-preemption would be a logical choice. One could also envision a hybrid scheme where CMS evaluates the program and makes a recommendation to the Department of Labor, in much the same way that the Department of Justice and Department of Health and Human Services collaborate on the “scheduling” of drugs under the Controlled Substances Act.¹⁸³

Yet even if we resolve the question of agency authority, there is still the vexing concern of inappropriate agency politicization of these decisions. After all, both of the de-preemption schemes discussed above – CAFE standards and the MDA – have been thrust into newspaper headlines and federal courts in the last year, as state and private actors allege that the agency involved has asserted its authority in impermissible ways.¹⁸⁴ One of the goals of state-based pay or play reforms is to fill gaps at the interstices of

¹⁷⁶ *Id.* § 360k(b) (2000).

¹⁷⁷ *See* 21 C.F.R. §808.1 (2007).

¹⁷⁸ *See* Robert Adler, *The 1976 Medical Device Amendments: A Step in the Right Direction Needs Another Step in the Right Direction*, 43 FOOD DRUG COSM. L.J. 511, 526 (1988).

¹⁷⁹ *See generally* William N. Eskridge, Jr., *The Continuum of Deference*, 96 GEO. L.J. 1083, 1113-14 (2008) (discussing the Supreme Court’s deference to the Department of Labor in ERISA cases). *But see* *Golden Gate Restaurant Ass’n v. San Francisco*, 2008 WL 4401387 (9th Cir., Sept. 30, 2008) (lower court did not defer to the Department of Labor).

¹⁸⁰ *See* About CMS, <http://www.cms.hhs.gov/History/> (last visited Nov. 20, 2008).

¹⁸¹ All states must have a Medicaid “State Plan” on file with CMS, and states must seek approval for all changes, either as “State Plan Amendments” or federal “waivers.” *See generally* Julia Gilmore Gaughan, *Institutionalization as Discrimination*, 56 U. Kan. L. Rev. 405, 408-12 (2008).

¹⁸² *See* Mark E. Douglas, *An Overview of the Recent State Rally for Health Care Reform*, 5 Ind. Health L. Rev. 277, 291-93 (2008) (describing how the Massachusetts reform plan interacts with the Medicaid program).

¹⁸³ *See* 21 U.S.C § 801.

¹⁸⁴ *See* *Riegel v. Medtronic*, 128 S. Ct. 999, 1012 (2008) (discussing the MDA and FDA’s de-preemption authority); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (discussing the EPA’s recent decision to deny California’s application for a change in CAFE standards).

federal health care reform, and inserting the federal bureaucracy into these decisions may frustrate this aim.

Another major concern arises as we consider pay or play reforms enacted by city governments, like the current law in San Francisco.¹⁸⁵ It is unclear how, or if, these programs could be evaluated for de-preemption. One model may be found, again, in the Medicaid context, where states have occasionally worked with city governments to create special programs that then receive federal approval. The best example of this is New York's outreach for AIDS patients in New York City in the early stages of the epidemic.¹⁸⁶ Yet this approach only adds an additional layer of review and may stifle the flexibility these programs need. A different option may be to allow city governments to apply directly to the federal regulator, but this poses its own federalism concerns.

Finally, any system of federal agency de-preemption would require statutory criteria by which state or local programs could be evaluated. This forces a conversation about the specific goals of ERISA preemption, and reaching a consensus may be even more politically challenging than the legislative reforms discussed above. Furthermore, statutory criteria would need to draw boundaries around the type of state or local law that would be eligible for de-preemption. If the option is targeted to only reach the archetypal pay or play program, experimentation may be unnecessarily closed off, but a broader focus may make de-preemption administratively impossible. Nonetheless, despite all of these concerns, an administrative de-preemption scheme creates a possible alternative and may allow more middle ground than a purely statutory change.

CONCLUSION

This Article has argued that most state and local pay or play laws are preempted by ERISA. Even when health care reform is tailored to survive a challenge, the preemption jurisprudence places such hurdles in front of program design that it impedes the ability to create flexible and creative reform structures. As health care reform is thrust into the national spotlight, legislators are presented with an opportunity to amend ERISA's preemption clause as part of a health care reform bill, yet little attention has been paid to the contours of legislative reform. Thus, this Article has proposed and analyzed a number of specific amendments that would tolerate health care reform at the state and local level.

One obvious possibility is to simply remove the controversial "relate to" language from the statute and leave ERISA to traditional field and conflict preemption principles.¹⁸⁷ Another approach continues expansive "relate to" preemption for ERISA regulation of pension plans, but leaves state and local law affecting welfare benefit plans without an express preemption clause.¹⁸⁸ Alternatively, reforms could graft new exceptions onto existing components of ERISA's preemption clause – the insurance/banking/securities exception,¹⁸⁹ or the compliance plan exception.¹⁹⁰ State and

¹⁸⁵ See San Francisco Health Care Security Ordinance, Ord. § 14.1-14.8 (2007).

¹⁸⁶ New York's Medicaid program contains a special provision for "AIDS adult day health care" in New York City, a program that is similar to, but separate from, other adult day health care services. See N.Y. COMP. CODES R. & REGS. tit. 10, § 425.6 (for nursing homes); N.Y. COMP. CODES R. & REGS. tit. 10, § 759.4 (for DTCs).

¹⁸⁷ See *Dillingham*, 519 U.S. at 334 (Scalia, J., concurring); *supra* Section III.A.

¹⁸⁸ See *supra* Subsection III.B.1.

¹⁸⁹ See *supra* Subsection III.B.2.

local governments could also seek specific congressional amendments exempting their particular pay or play programs, as Hawaii did in 1982.¹⁹¹ Finally, the Article explored a proposal for ERISA de-preemption moderated by a federal agency.¹⁹²

Each of these proposals has different advantages. Abandoning the “relate to” language, in its entirety or as applied to welfare benefit plans, is the only alternative that deals effectively with reforms by local, as opposed to state, government entities. Yet these approaches may place intolerable administrative burdens on employers, and may be politically impossible. At the same time, more targeted and politically palatable reforms – including modification of the compliance plan exception or agency-based de-preemption – may so constrain the design of pay or play reforms that they are hardly better than the current scheme. Administrative de-preemption is further hampered by program complexity and important questions about its feasibility, but if successfully implemented, it could provide a compromise option that promoted state and local experimentation while satisfying some employer concerns.

Perhaps the best alternative is to add health care reform to the insurance/banking/securities exception. The types of pay or play programs covered by this change are reasonably broad, but employers are exposed to state regulation in a more narrow and predictable area. This proposal has the further advantage of mitigating some of the more pernicious concerns associated with employers’ use of the “deemer clause” to escape state regulation of health insurance benefits,¹⁹³ though that fact in and of itself may pose political difficulties.

Indeed, it is hardly obvious where negotiations to amend ERISA’s preemption clause will lead. Additionally, the process will have to tackle concerns that reach well beyond the context of pay or play health care reform, and those topics are outside the scope of this Article. But if nothing else, this discussion serves to begin a conversation about how ERISA can be amended by placing possibilities on the table and providing a sense of the trade-offs and concerns in play.

¹⁹⁰ See *supra* Subsection III.B.3.

¹⁹¹ See *supra* Subsection III.C.1.

¹⁹² See *supra* Subsection III.C.2.

¹⁹³ See *supra* notes 8-10 and accompanying text.