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Client Alert

A report for clients and friends of the Firm

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ERISA Fatal To "Healthy San Francisco" Program

In a decision having potential implications for a number of proposed health insurance mandates by cities and states across the country, on December 26, 2007 a U.S. District Court for the Northern District of California found part of San Francisco's Health Care Security Ordinance (the "Ordinance") to be preempted by the Employee Retirement Income Security Act ("ERISA"). Specifically, the employer expenditure requirements, which were scheduled to take effect on January 1, 2008, would have required private San Francisco employers to provide health care coverage or pay into a fund providing health insurance to their employees. Awarding injunctive relief to the plaintiffs, the Court in *Golden Gate Restaurant Ass'n v. San Francisco*, No. 06-06997, 2007 U.S. Dist. LEXIS 94112 (N.D. Cal. Dec. 26, 2007) issued an order preventing enforcement of these requirements. Although the City of San Francisco has sought an emergency stay of the order pending its appeal, at present the District Court's decision is binding and it nullifies these provisions of the Ordinance.

The Ordinance

Passed by the city council in 2006 as part of the "Healthy San Francisco" initiative, the Health Care Security Ordinance requires covered employers to make health care expenditures for their covered employees. Depending on the number of individuals they employ, private employers would have to make a certain minimum expenditure by paying directly into health spending accounts, contributing to private health insurance plans, or participating in "*Healthy San Francisco*," a city health plan also created by the Ordinance. Covered employees would include any person who has been employed for at least ninety calendar days and who performs at least ten hours of work per week within the geographic boundaries of the City and County of San Francisco. The Ordinance's expenditure requirements, which were to be enforced by the city's Office of Labor Standards Enforcement, were to take effect on January 1, 2008 for employers with 50 or more employees, or on April 1, 2008 for for-profit employers with 20 or more employees.

The Challenge and Decision

In November 2006, the Golden Gate Restaurant Association, a non-profit trade association of Bay Area restaurants and related-businesses, brought a lawsuit challenging the Ordinance in federal court. The Association sought declaratory and injunctive relief to prevent enforcement of the Ordinance on the grounds that it was preempted by federal ERISA legislation. The District Court agreed. In granting summary judgment for the plaintiffs, Judge Jeffrey S. White concluded that, while its goal is "a laudable one," the Ordinance is nonetheless preempted under ERISA's expansive preemption clause. *Id.* at *30.

ERISA Preemption

As the Court noted, ERISA was enacted by Congress to be a comprehensive scheme "eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Id.* at *8. To that end, it includes an expansive preemption clause by which it expressly supersedes "any and all State laws insofar as they…relate to any employee benefit plan." 29 U.S.C. § 1144(a). Subsequent U.S. Supreme Court decisions have made clear that a state law is preempted by ERISA if it is either *connected with* or *makes reference to* an ERISA plan. *Golden Gate*, 2007 U.S. Dist. LEXIS at *10.

Applying this test to the San Francisco Ordinance, the Court concluded that its expenditure requirements are preempted on both grounds. First, the Court found an "impermissible connection" because, by "requiring certain mandatory levels of health care coverage" and by "impos[ing] specific recordkeeping, inspection, and other administrative burdens" on employers, "the Ordinance affects plan administration, a core area of ERISA concern." *Id.* at *17, *18. Moreover, the requirements "directly and indirectly affect the relationship between private employers and the provision of health care coverage," a relationship, the

Court notes, "that has traditionally been governed by ERISA." *Id.* at *21. Lastly, the Court found a prohibited connection in that the Ordinance "interferes with nationally uniform plan administration." *Id.* at *23. If the expenditure requirements were not preempted, the Court explained, "employers would necessarily have to keep an eye on the minimum health care spending requirements in each locality in order to comply with potentially conflicting requirements." This would conflict with "ERISA's promise to provide a uniform regulatory regime." *Id.* at *24.

In addition, the Court found that the Ordinance makes unlawful reference to ERISA plans in that it "specifically references the existence of [such] plans," and in that it "cannot operate successfully" without them. *Id.* at *24, *18. Indeed, the Court found that ERISA plans are not only essential to the Ordinance because they happen to be the most common form of benefit plan, but that city officials cannot avoid examining "whether employers provide ERISA-governed benefits" in order to determine compliance with the expenditure requirements. *Id.* at *25-26. Accordingly, the Court found the employer expenditure requirements preempted by ERISA, and awarded summary judgment to the plaintiffs.

Outlook

Although the Court's order has immediate effect, following the decision the City Attorney's office announced it would seek an emergency stay of the order from the U.S. Court of Appeals for the Ninth Circuit, pending the City's appeal. The City intends to argue that an emergency stay is warranted because thousands of San Francisco workers will be without health insurance during the appeal process, which could last for months. While this is not the kind of irreparable harm that normally justifies an emergency stay, it is unclear what the Ninth Circuit will do. We will monitor this case closely and bring to your attention any significant developments.

Assuming the Court's decision is not overturned, it casts serious doubts on the prospects of similar legislation statewide in California or elsewhere. State and local lawmakers may attempt to learn from this decision, however, and craft subsequent health care mandates more carefully so as to avoid implicating ERISA plans. Only time will tell whether this can be done successfully.

No Effect On Other San Francisco Ordinances

Finally, San Francisco employers should be aware that the Court's decision has no impact on the San Francisco Paid Sick Leave Ordinance, Health Care Accountability Ordinance, or any other state or local laws. The Health Care Security Ordinance was the only law at issue in this litigation. Employers should continue to comply with all other state and local laws.

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