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SCOTUS Denies Review and Leaves Seattle's "Play-or Pay" Ordinance Intact

Labor Relations Update on **November 30, 2022**

On November 21, 2022, the Supreme Court declined to review whether federal law preempts a Seattle Ordinance mandating that large hotels offer their employees health insurance coverage or increased pay. This left the Ninth Circuit's ruling, which found that the particular ordinance was not preempted, as the last word on the issue (at least for now).

Background Regarding the Seattle Ordinance

The Seattle Ordinance mandates that covered employers in the hotel sector make minimum monthly healthcare expenditures on behalf of their covered employees. Employers can satisfy the Ordinance in one of three ways:

1. by making the minimum monthly payments to a third party, such as an insurance carrier;
2. by including covered employees in a self-funded healthcare plan offering average per-capita monthly expenditures for the covered employees that match or exceed the mandated minimums; or
3. by making direct monthly payments to their covered employees that match or exceed the mandated minimums.

The Ninth Circuit's Decision

In March 2021, the Ninth Circuit held that the Seattle Ordinance was not preempted by ERISA. In so ruling, the Court reasoned that a local ordinance mandating that employers in the hotel industry offer workers certain minimum monetary payments for healthcare expenditures is not tantamount to a state or local law mandating the creation of an ERISA-covered benefit plan because an employer "may fully discharge its expenditure obligations by making the required level of employee health care expenditures, whether those expenditures are made in whole or in part to an ERISA plan, or in whole or in part to [a third party]."

Petitioner's Arguments in Support of SCOTUS Review

The ERISA Industry Committee ("ERIC"), a trade association representing large employers who sponsor ERISA-covered plans, petitioned the Supreme Court to review the Ninth Circuit's decision, urging that review was necessary to preserve "ERISA's national uniformity" and to settle a circuit split between, on the one hand, the Ninth Circuit, which found that the Seattle Ordinance was not preempted by ERISA and, on the other hand, the First and Fourth Circuits, which found that similar local ordinances in Massachusetts and Maryland, respectively, were preempted by ERISA.

ERIC argued that the Seattle Ordinance makes "reference to" ERISA-covered plans and thus is preempted by ERISA. ERIC explained that, even though the Seattle Ordinance had an "or pay" option, most covered employers—especially the large hotel employers targeted by the Ordinance —already "have pre-existing ERISA plans," and, therefore, complying with the Seattle Ordinance will invariably necessitate amendments to employers' existing ERISA plans. As ERIC explained, that was precisely the reason the First and Fourth Circuits concluded that similar laws were preempted by ERISA:

- In *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180 (2007), the Fourth Circuit held that a Maryland law that required a single employer (Wal-Mart) to spend 8% of total wages on state health insurance costs or else pay an equivalent shortfall to the state was preempted by ERISA, finding that despite the "or pay" option, the law offered employer no rational choice but to alter their ERISA plans in order to avoid paying a penalty.
- Similarly, in *Merit Construction Alliance v. City of Quincy*, 759 F.3d 122 (2014), the First Circuit found a local ordinance preempted by ERISA, where it regulated apprenticeship programs, because "employers could comply only by using an existing ERISA apprentice plan or establishing a separate plan" —in this case, unlike with respect to the Seattle Ordinance, the law did not provide an "or pay" option.

ERIC further cautioned that, in the absence of preemption, state or local laws like the Seattle Ordinance will "impose burdensome, locality-specific obligations on employers" akin to "the pre-ERISA state of affairs" in which the nation lacked a uniform plan administration regulatory scheme.

Solicitor General's Arguments Against Certiorari

At the invitation of the Supreme Court, the Solicitor General submitted a brief on behalf of the United States, requesting that the Court deny ERIC's request for review. The Solicitor argued that the Ordinance did not make an impermissible reference to, or have an impermissible connection with ERISA plans because "the Ordinance itself establishes specific expenditure amounts that apply to all covered employers and employees, regardless of whether the employer has an ERISA plan or the employee participates in it." Additionally, the Solicitor argued that the "or pay" option permits employers to comply without establishing an ERISA plan, and does not "single out ERISA plans or sponsors for differential treatment."

The Solicitor also disagreed with ERIC's assertion of a Circuit split "because the laws involved in the cases on which petitioner relies differed in material respects from the one in this case." Namely, the Solicitor argued that First and Fourth Circuit cases are distinguishable because the regulations at issue in those cases did not provide meaningful non-ERISA alternatives for compliance—whereas here, employers could comply by making payments directly to employees.

Takeaways

In declining to review the Ninth Circuit's decision, the Supreme Court leaves unanswered concerns raised by ERIC about plan uniformity and administration in the face of so called "play-or-pay" laws like Seattle's Ordinance. In the absence of future judicial intervention or federal legislation, and as ERIC explained in its petition to the Supreme Court, these state and local laws are likely to have a significant economic impact on employers providing benefits.

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