ERISA Considerations in Connecticut Health Reform: An Overview

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† standard disclaimer applies
Why Care about ERISA?

- ERISA governs employer/union health benefits plans, which are mainstay of coverage
- States often want to maintain existing coverage while expanding to currently uninsured
- Health plan assessments are often seen as a potential source of revenue
- Courts have invalidated some state insurance initiatives, on ERISA grounds
  - mandates to provide insurance
  - some rules about managed care
What Is E.R.I.S.A.?

- Essence Really Is Simple, Actually

- The Employee Retirement Income Security Act of 1974, as amended, 29 U.S. Code chapt. 18, ...

- ...creates new federal regulation of “employee benefits plans” (pensions more than health) ...

- ... and blocks state regulation, even if not in direct conflict with any federal rules

- Therefore, states must act carefully in any rule affecting employee benefits plans
Key Things to Know

- What ERISA reserves to federal authority, what is left to states
- Lawyerly lingo: four key clauses
  - supremacy
  - preemption
  - savings
  - deemer
Broadly Preempts State Law

- ERISA supercedes “any and all State laws” ...
  - incl. statutes, regulations, judicial determinations, etc.
  - known as the “preemption clause” of ERISA
  - under “supremacy clause,” federal power trumps state

- ... that “relate to” ...
  - court interpretations have evolved (more below)

- ... “any employee benefit plan”
  - includes health benefits
  - private plans, not public or church plans
  - whether “ERISA plan” is insured or self-insured

- Very broad language of preemption ...
  - encourages benefit provision, allows uniform operations
Exceptions

- States may continue to regulate insurance, banking, and securities
  - these traditional state functions are “saved” from preemption, so this is the “savings clause” of ERISA

- Thus, states may to some extent indirectly affect employer plans by regulating insurance
  - litigation has defined permissible foci of regulation

- However, states may not deem private employer or union plans to be “insurance”
  - known as the “deemer” clause
  - states thus cannot regulate self-insured benefits
State & Federal Authority

- Federal authority
- State authority

(Note: relative sizes only illustrative)

- Uninsured
- Target for state expansion

- Federal employees plan

- Private employee benefits, self-insured
  - Federal ERISA reg’n only

- Private employee benefits, fully insured
  - Federal and state insur. reg’n

- State and local employees plans
  - State only

- Non-group insurance - state only

Source: adapted from Butler, *ERISA Primer*, NASHP 2000
Breadth of “Relating to” Preemption

Courts through mid-1990s minimized state power
- Relating meant referring to ERISA plans or being connected to them because a challenged law:
  - addressed subjects similar to ERISA’s
  - regulated ERISA plans’ structure, operations
  - imposed costs on plans
- ordinarily, “relate” includes relatively minor relations

Landmark mid-1990s Sup. CT. cases cut states more slack:
- allowed (other) traditional state activities to affect plans so long as costs imposed are not substantial
- Hospital surcharges OK even though paid by ERISA plans or their insurers
So, What’s this All Mean for Health Reform?

(1) **No-No’s for State Action**

- Mandating that employers or unions provide employee benefits
- Taxing ERISA plans
- Directly regulating ERISA plans
  - eg, minimum employer share of premium, solvency requirements, benefits
- Explicitly targeting ERISA plans
- Imposing substantial costs on ERISA plans indirectly, through other regulations
Meaning for Health Reform, cont’d

(2) Likely Permissible State Actions

- Taxation of
  - fully insured health plans
  - health care providers, or
  - employer payrolls
- Providing subsidy usable for any health benefits
- Providing credit against payroll tax for costs of (tax-approved) health benefits
  - Important: should not be transparent attempt to force offer of coverage; should not set quasi-regulatory standards to qualify for credit
Practical Advice

- ERISA facilitates challenges to state power
- Judges follow the news
- Use traditional state powers and target broadly, not narrowly at ERISA plans
- Share burden of funding, don’t overburden challengers under ERISA
- Focus on revenue, not regulation
- Engage in preventive lawyering
End

Time for questions
A Few Citations


