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San Francisco Ordinance Regulating Employer Health Spending Not Preempted By ERISA

October 7, 2008 - Reversing a December 26, 2007 decision by the U.S. District Court for the Northern District of California, the Ninth Circuit ruled last Tuesday that the San Francisco Health Care Security Ordinance, which regulates employer health spending requirements and provides for a government health care program funded partially by employer contributions, is not preempted by the federal Employee Retirement Income Security Act (ERISA). Plaintiff, Golden Gate Restaurant Association (“the Association”), challenged the employer spending requirements of the Ordinance, arguing that ERISA preempted the requirements either because those requirements create a “plan” within the meaning of ERISA or because they “relate to” employers’ ERISA plans.

The Ordinance affects employers doing business in San Francisco and required to obtain a valid San Francisco business registration certificate from the San Francisco Tax Collector's office. It affects for-profit employers with 20+ employees and nonprofit corporations with 50+ employees. For-profit businesses with 20 to 99 employees and nonprofit corporations with 50+ employees must make health care expenditures at a rate of \$1.17 per hour per covered employee, while businesses with 100 or more employees must spend \$1.76 per hour per covered employee. “Covered employees” are persons who work in the City; work at least ten hours per week; have worked for the employer for at least 90 days; and are not otherwise excluded from coverage.

Employers may fulfill this requirement in a variety of way, including but not limited to making contributions to a health savings account as defined under Internal Revenue Code section 223, reimbursing covered employees for expenses incurred in the purchase of health care services, paying a third party to provide health care services for covered employees, or making payments to the City for the benefit of covered employees. Where the employer makes payments of at least \$1.17 or \$1.76 per hour (depending on the number of employees and status of the employer), it is exempt from making payments to the City. Moreover, an employer will be partially exempt to the extent it makes lesser expenditures. Accurate recordkeeping is required.

The Ninth Circuit held that ERISA does not preempt the Ordinance, because the Ordinance neither created nor related to an ERISA plan. Rather, payments are made out of the employer’s general assets on a periodic basis based on hours worked by the employees with very little discretion as to administration of the benefits. Although employers may elect to make payments through the City, it is not required. The Ordinance does not require an employer to adopt a health plan or provide specific benefits through an existing plan. “Any employer covered by the Ordinance 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 the City.” No change in the administration of an employer’s current plan is required.

The Ninth Circuit decision raises the prospect of similar ordinances being upheld in the future.

If your company engages in business in San Francisco or the surrounding area, we encourage you to review your health care benefits with our attorneys to ensure compliance with the provisions of the Ordinance.

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