Pay, Play, or Sue: A Review of the Ninth Circuit’s Opinion in *Golden Gate Restaurant Association v. City and County of San Francisco, et al.*

By Anne S. Kimbol, J.D., LL.M.

Combine the election cycle, fears about the economy, and the growing costs of healthcare and caring for the uninsured, and you get a perfect recipe for health reform measures. With health reform measures and the need to fund them, you get a perfect recipe for lawsuits. The current battleground is in San Francisco, a liberal city in the jurisdiction of the most liberal Circuit Court of Appeals. Things were bound to get interesting.

The San Francisco Board of Supervisors unanimously passed the San Francisco Health Care Security Ordinance in 2006. The Ordinance contains an employer mandate which would require private employers with 20-99 full-time employees or a nonprofit with 50 or more full-time employees to make health care expenditures of $1.17 per hour for each covered employee. Private employers with 100 or more full-time employees would be required to spend $1.76 per hour. Full-time employees are those that work more than 10 hours a week and have been employed for 90 days. Any difference between the amount a covered employer spends on health care expenditures, either directly or through a third-party administrator, and the per hour costs multiplied by the number of employee-hours worked in San Francisco must be paid to the City.

The response to this employer mandate was not unexpected. The Golden Gate Restaurant Association sued the City and County of San Francisco, alleging that the health expenditure requirement of the plan was preempted by the Employee Retirement Income Security Act of 1974 (ERISA). The Restaurant Association prevailed at the district court level in its motion for summary judgment. The Court began with a review of ERISA similar to that provided by the Fourth Circuit in *Retail Industry Leaders Ass. v. Fielder.*

*Retail Industry Leaders*, like the San Francisco case, revolved around a “pay or play” employer mandate. The Retail Industry Leaders Association (RILA), an association representing Wal-Mart among other retail giants, argued that a Maryland plan requiring Wal-Mart to pay a percentage of its payroll for employee healthcare either directly or through a state-level plan, was preempted by ERISA; the State argued that it was a payroll tax with a credit offered for healthcare spending.

The Fourth Circuit began its analysis by noting that ERISA defines plans so broadly that any organized provision of healthcare benefits to employees would constitute a plan. The Court also stated that the goal of ERISA was to provide uniform regulation over employee benefit plans nationwide and so preemption was written expansively to cover

---

1 *Golden Gate Restaurant Association v. City and County of San Francisco*, slip op., 2007 WL 4570521 (N.D. Cal. filed Dec. 26, 2007) [hereinafter *Golden Gate I*].
2 *Golden Gate Restaurant Association v. City and County of San Francisco*, No. 07-17370 (9th Cir. filed Jan. 9, 2008) [hereinafter *Golden Gate II*].
3 *Golden Gate I*, supra note 1, at *3-5.
4 *Retail Industry Leaders Ass. V. Fielder*, 475 F.3d 180, 185-190 (4th Cir. 2007).
5 *Id.* at 190-191.
state laws relating to an ERISA plan, a goal that must be considered in analyzing ERISA disputes.\textsuperscript{6} ERISA preemption, though broad, is not complete - states retain the authority to regulate health care providers and insurance companies, but they can not mandate the structure or administration of covered employee benefit plans.\textsuperscript{7}

The Supreme Court has read ERISA preemption to include all state laws that have a connection with or reference to an ERISA plan.\textsuperscript{8} The law is preempted if it directly impacts a plan or if it effectively requires certain benefits; this would includes laws that directly regulate employers’ contributions to or structuring of a plan.\textsuperscript{9}

Following this legislative and judicial history, the Fourth Circuit rejected Maryland’s argument that by allowing employers to pay a penalty to the State rather than spend the required amount through their plans the law was saved. The Fourth Circuit noted that the aim of the law was to require employers to provide insurance coverage to their employees, that such a law would undermine the uniform regulatory scheme at the heart of ERISA, and that any rational employer would spend the required amount on insurance coverage, as it would be in effect adding to its employees’ wages, rather than make the no-win choice of sending the money to the state.\textsuperscript{10}

Under the Fourth Circuit’s reasoning, which is consistent with commonly held views of ERISA preemption, “pay or play” laws can not be implemented with respect to ERISA plans. Given how common such plans are, an employer mandate would be of minimal impact if ERISA plans were exempted from its reach.

The District Court in the \textit{Golden Gate Restaurant} case followed a similar path to the Fourth Circuit. Its opinion states, “The Ordinance’s health care expenditure requirements are preempted because they have an impermissible connection with employee welfare benefit plans. By mandating employee health benefit structures and administration, those requirements interfere with preserving employer autonomy over whether and how to provide employee health coverage, and ensuring uniform national regulation of such coverage. The Ordinance’s provisions also make unlawful reference to benefit plans because they refer to, are designed to act immediately upon, and cannot operate successfully without the existence of employee welfare benefit plans.”\textsuperscript{11}

The District Court focused on the administrative requirements for recordkeeping, inspections, and administration of the benefit plans that would impact all covered ERISA plans.\textsuperscript{12} As to the expenditure requirement, meeting it would require either modification of some existing plans or modification of the administration of the plans to determine the amount spent on the plans as compared to the expenditure required by the Ordinance.\textsuperscript{13}

\begin{itemize}
\item \textsuperscript{6} \textit{Id.} at 191.
\item \textsuperscript{7} \textit{Id}.
\item \textsuperscript{8} \textit{Id}.
\item \textsuperscript{9} \textit{Id.} at 192.
\item \textsuperscript{10} \textit{Id.} at 193-194.
\item \textsuperscript{11} \textit{Golden Gate I, supra} note 1, at *6.
\item \textsuperscript{12} \textit{Id.} at *6-7.
\item \textsuperscript{13} \textit{Id.} at *7.
\end{itemize}
Looking at either factor, the District Court found grounds for preemption and therefore grounds for granting the Restaurant Association’s motion for summary judgment.\footnote{Id. at *11.}

The decision was appealed to the Ninth Circuit Court of Appeals and heard by a three-judge panel of that Court. San Francisco and labor unions that had intervened in the case asked the three-judge panel to stay the District Court’s judgment pending a decision on the merits by the Circuit Court.\footnote{Golden Gate II, supra note 2, at *3.}

The panel begins by reviewing the standard for granting a stay pending appeal. The factors that need to be examined are whether the applicant has made a strong showing that s/he is likely to succeed on the merits, whether the applicant will be irreparably harmed without the stay, whether the stay will substantially injure other interested parties, and where the public interest lies.\footnote{Id. at *5.}

The panel then begins to examine the case at hand. It rejects the Restaurant Association’s argument that a higher standard than that normally required for a stay should be used as the stay would change the status quo. The panel finds that preserving the status quo is not a factor to be considered and that the status quo would be on San Francisco’s side if not for the District Court opinion.\footnote{Id. at *6-8.}

The next issue is the Ordinance itself. The panel reviews the health expenditure formula and relevant definitions. While the Ordinance requires employers to maintain records, the exact form of the records are not mandated. The panel then separates the relevant employers into five categories: No Coverage Employers are those without ERISA plans; Full High Coverage Employers provide ERISA plans for all employees and are already meeting the expenditure requirement; Selective High Coverage Employers have ERISA plans for some employees and spend more than the expenditure amount on those employees; Full Low Coverage Employers provide ERISA plans for all employees and do not meet the expenditure requirement; and Selective Low Coverage Employers have ERISA plans for some employees and do not meet the expenditure requirement.\footnote{Id. at *8-12.}

Under the Ordinance, No Coverage Employers could either pay the full expenditure amount to the City or they could decide to establish ERISA plans to offset all or some of the amount to be sent to the City. The exact details of which employees would be covered by any ERISA plan or what benefits would be provided are not dictated by the Ordinance.\footnote{Id. at *12.} At this point in the opinion, it becomes clear that the Ninth Circuit will not be following the Fourth Circuit’s “rational employer” analysis, which assumed employers would rather use the money towards benefits for their employees, thereby increasing their compensation, than paying the government, which would provide no incentives to their employees.

\footnote{14 Id. at *11.} \footnote{15 Golden Gate II, supra note 2, at *3.} \footnote{16 Id at *5.} \footnote{17 Id. at *6-8.} \footnote{18 Id. at *8-12.} \footnote{19 Id. at *12.}
Full High Coverage Employers could leave their ERISA plans as they are. Their only requirement under the Ordinance would be to maintain the necessary records. Selective High Coverage Employers could also keep their plans as they are and make the necessary payment to the City. If they chose to expand their plan to all employees covered by the Ordinance, that would be their choice.\textsuperscript{20}

Full and Selective Low Coverage Employers could also keep their plans, but they would have to pay the City for the difference between their expenditures on their ERISA plans and their required expenditures under the Ordinance. As with the Selective High Coverage Employers, the Low Coverage Employers would have the option to expand their plans.\textsuperscript{21}

The panel thereby concludes that the Ordinance would not require the establishment or alteration of any existing ERISA plans; it would merely require certain payments be paid either to an ERISA plan or to the City. Exact benefits would not be mandated, just budgets.\textsuperscript{22}

Following this reasoning, the applicants’ motion for a stay is successful. They have shown that they are likely to succeed on the merits as the Ordinance looks at expenditures and not benefits per se. While there are administrative requirements, they exist regardless of whether the employer maintains an ERISA plan.\textsuperscript{23} The Ordinance therefore burdens an employer, not a plan.\textsuperscript{24}

The panel also concludes that the Ordinance is unlikely to be preempted for referring to an ERISA plan. The Ordinance acts on the employers, not plans, and can have full force and effect even if no San Francisco employers have ERISA plans. Again, the panel relies on the fact that no ERISA plans would have to be created or changed in order to comply with the Ordinance.\textsuperscript{25}

The applicants also win their stay on the balance of hardships and public interest factors. The Court would not be able to hear the case on the merits until April or May, which would delay implementation of the Ordinance. Twenty thousand uninsured San Francisco employees who would not receive health benefits either through their employers or the City during that time would if the Ordinance was in effect. Lack of health insurance leads to limited healthcare access, which causes human suffering, illness, and death. While the Association members may have to spend more money than they would without the Ordinance, the opposite is true for San Francisco, which would suffer the economic consequences of uninsured workers going to the emergency room instead of seeking more efficient care.\textsuperscript{26}

\textsuperscript{20} Id. at *13.  
\textsuperscript{21} Id. at *13-14  
\textsuperscript{22} Id. at *14.  
\textsuperscript{23} Id. at *15-22.  
\textsuperscript{24} Id. at *23.  
\textsuperscript{25} Id. at *23-28.  
\textsuperscript{26} Id. at *28-31.
The hardships analysis leads into the public interest analysis with respect to human cost of delaying the Ordinance and the financial interest of the general public to receive less costly more timely health care. While some employers and consumers may leave San Francisco as prices increase due to the cost of the Ordinance on employers, they also might not. Additionally, local officials showed the public interest in this issue by passing the Ordinance. As the Court already determined that ERISA did not preempt the Ordinance, the presumption that the local officials represent the public interest could not be overcome by any relevant federal law or guidance. Therefore the stay is granted, and the Ordinance will go into effect until the Circuit Court can hear the case on the merits this spring.27

Until the full Ninth Circuit hears the case and decides it on the merits, the true extent of any conflict between the circuit courts on ERISA preemption of “pay or play” laws will not be known. It is clear, however, that the Ninth Circuit is leaning in a direction that utterly contradicts what everyone – with the possible exception of the Ninth Circuit – who had ever thought about this issue believed the answer to be. ERISA preemption is extremely broad. In order to meet the goal of national regulation of employee benefit plans, it has to be. If, as the Fourth Circuit mentioned, each state, city, or locality had a different law about providing healthcare to employees, the difficult patchwork of compliance with the laws would cause the exact situation ERISA was meant to avoid. The Ninth Circuit panel’s hair-splitting decision seems to rely on the fact that the word ERISA was not actually included in the Ordinance. The difference, as discussed by the Fourth Circuit, between mandating exact benefits and mandating an exact expenditure on healthcare would have no real significance in terms of the administrative burdens employers would face.

While arguments can be made that ERISA was passed in 1974 and therefore does not properly reflect a 2008 healthcare system, that potential conflict can only be resolved by Congress, which has expressed no real interest in doing so and would likely only even consider such a move after the next presidential election. Courts can certainly state in their opinions that they do not like the legal conclusion or that they wish things might be different – attempting to nudge Congress into action – but they can not completely rewrite ERISA preemption to fit the needs of today’s healthcare reformers. If the Ninth Circuit agrees with the findings of its three-judge panel, it can expect its decision to get slapped down by the Supreme Court as if it was a Fifth Circuit opinion on the death penalty.


27 Id. at *31-33.