

Implementation Considerations for Universal Coverage: ERISA

California Association of Health Underwriters

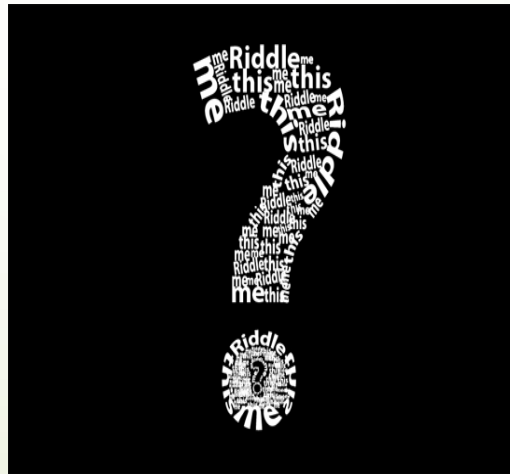
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Churchill's Description of Russia Might Help Here

- It is a riddle wrapped in a mystery inside an enigma;
but perhaps there is a key.
- Churchill, The Russian Enigma, October, 1939



What is ERISA?

- The Employee Retirement Income Security Act of 1974 (**ERISA**) is a federal law that regulates private-sector pensions and other employee benefit programs, including job-based **health** coverage.
- **ERISA** is relevant to **health** policy because it preempts state laws that relate to employee plans.
- Federal **preemption** is a doctrine that asserts that when state law and federal law conflict, federal law displaces, or preempts, state law, due to the Supremacy Clause of the Constitution. U.S. Const. art. VI., § 2.

Preemption

- Comes in different flavors and strengths.
- Not only displaces conflicting state laws (conflict preemption).
- But also displaces state laws that relate to an ERISA plan, whether or not in conflict with existing federal law.
 - Though *sometimes* federal law explicitly permits states to implement stricter standards (floor preemption), e.g., HIPAA.

States as Drivers of Health Care Policy

- States are increasingly drivers of health care policy.
- Examples:
 - Rx drug costs
 - Surprise medical bills
 - Fifty different shades of Medicaid

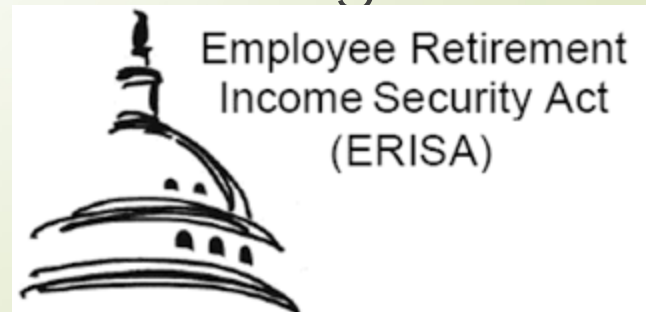


ACA Did Not Repeal ERISA

- ▶ But it did modify/amend ERISA in some very specific ways:
 - ▶ Rules relating to the prohibition of preexisting condition exclusions,
 - ▶ Rules prohibiting lifetime and annual dollar limits for essential health benefits,
 - ▶ Rules prohibiting rescissions, and required coverage of certain preventive services without cost sharing.

Private Sector: Difference Between a Fully Insured and Self-Insured Plan

- Self-funded ERISA plans are exempt entirely from state regulation and state law claims.
- This creates an incentive for employers to become self-insured: exempt from state regulation and benefit mandates.
- An estimated 60% plus of Americans with employer-based health insurance coverage are found in self-insured plans.



What is Left to the States by ERISA?

- Tax and regulate traditional insurers performing traditional insurance functions.
- Regulate multiple employer welfare arrangements.
- Regulate hospital rates charged to insurers and others who pay health care bills, tax health care providers.
- Provide remedies for injuries when a health plan controls medical care delivery/traditional med mal cases.

What Can't the States Do Under ERISA?

- Directly regulate private employer-sponsored health plans.
- Mandate that private employers offer or pay for insurance.
- Tax private employer-sponsored health plans themselves.
- Regulate self-insured private employee plan benefits or financial solvency.



Ambiguous State Authority to Regulate Health Insurance Under ERISA

- Regulation of stop-loss insurance.
- Independent external review/appeals programs.
- Employer pay-or-play health care programs.
- Regulation of third party administrators (TPAs) that administer self-insured plans.



What About State Specific Health Care Reform?

- ▶ ERISA may prohibit an employer mandate (because it “relates to” employer sponsored plans)
- ▶ An individual mandate is most likely to avoid challenge if it makes no reference to employer-sponsored health plans.
- ▶ Even taxes can raise ERISA preemption problems if state law conditions tax advantages or disadvantages on plan design features.

Golden Gate Restaurant Assoc. (9th Cir. 2008)

- ▶ SF's "pay or play" ordinance was upheld because it was not itself an ERISA plan.
- ▶ Because the City and County of SF had offered an alternative that was not available in *Fiedler*.
- ▶ No certiorari, ACA passed
 - ▶ Might be where the story continues.



Gobeille v. Liberty Mutual (U.S. 2016)

- ▶ ERISA pre-empts a Vermont law that requires certain entities, including health insurers, to report payments relating to health care claims and other information relating to health care services to a state agency for compilation in an all-inclusive health care database.



Hey, this Magic 8-ball just keeps saying 'it depends!'

Oh, that's the special 'Lawyer Edition!'