

**Testimony before the U.S. House of Representatives Committee on Education
and Labor Subcommittee on Health, Employment, Labor and Pensions**

May 22, 2007

By: Montana Insurance Commissioner John Morrison, J.D.

Good afternoon. My name is John Morrison, I am the Montana State Auditor, and have served as the Commissioner of Insurance and Securities for the State of Montana since 2001.

I want to thank the committee for inviting me to testify and for being willing to examine this issue of how ERISA may be an obstacle that prevents state-based health care reform.

Like other states, Montana is clearly taking the bull by the horns and attempting to find new, innovative solutions to solve the health care crisis. In the 2007 legislative session, the state Senate and the House passed a joint resolution to create an interim committee to study ways to create "a system of universal, portable, affordable health insurance coverage for all Montanans that involves private health insurance issuers and that incorporates existing public programs." The bill directs the interim committee to specifically examine the concept of a health insurance exchange and the way that such a connector or exchange could be implemented in Montana. In addition, it directs the committee to study the advantages and disadvantages of mandating private universal coverage for all Montanans. [HJ 48]

In addition, in 2005 my office prepared legislation that created the Insure Montana Program. Governor Schweitzer joined me in requesting introduction of the bill and signed it into law that year. This program, administered by the insurance department, creates a voluntary purchasing pool for small employers with 2 to 9 employees and provides premium assistance to both the employees (variable based on income) and the employers. In addition, there are tax credits for other small employers who sponsor small employer group health plans. Insure Montana now makes health coverage affordable for nearly 10,000 Montana small business employees and their families.

Montana is a very rural state, with many small employers and a 19% uninsured rate. The existing health care crisis spreads across this entire country, but the best solutions for addressing this common problem vary widely from state to state because of widely varying demographics. Solutions that work in Massachusetts or in California

may not work in Montana, and that is why state-based health reforms may be the most expeditious solution to a growing national problem. States can experiment with reforms on a smaller scale, so that the effectiveness of those reforms can be tested.

ERISA preemption of state regulation has been an obstacle to state-based health care reforms and will continue to be an obstacle to some future reforms now being contemplated by many states. For instance:

1. In 2007 the Montana legislature passed a new law that requires health insurance plans to allow parents to continue to insure their children under the parent's health insurance policy until age 25, even if the child is not a full-time student. This is a simple, but important reform because the age group between 19 and 30 years old typically has the highest uninsured rates. Continuing to cover those young adults on their parents' policies is a cost-effective way to provide health coverage for those individuals. Dependents who lose coverage under their parents' health plan often end up in public insurance programs or subsidized clinics, or incur unreimbursed medical care.

This new law cannot be applied to self-funded employer health plans because of ERISA, and therefore can only be a partial solution.

2. Some years ago, Montana created the Montana Comprehensive Health Association, which offers high-risk pool coverage to individuals who are unable to get coverage in the individual market because of their health status. It also offers coverage to individuals who are federally eligible for portability coverage pursuant to HIPAA. Both of those risk pools are funded by a 1% assessment on all private health insurance premiums written in this state, as well as the premium collected from the individual participants. Because of ERISA preemptions, self-funded employer plans do not contribute to the funding for this program, even though their employees are able to take advantage of the portability pool when they lose their employer coverage. The financial viability of this program has been increasingly threatened since the passage of the HIPAA portability requirements. Access to coverage for persons losing employer coverage is a very important consumer protection provided by federal HIPAA law, but the states were left to shoulder the burden of the cost of that reform. ERISA prevents the states from assessing self-funded employer plans, and the entire burden is shifted to persons who pay private health insurance premiums and other state funding sources. Experience in Montana has shown that portability pool participants also tend to be high-risk individuals, and the pool cannot be maintained by premiums alone. Assessments or other funding sources are necessary.

We work hard to keep premiums affordable in this program and, to that end, we instituted a premium-assistance program for individuals who are 150% or below the FPL. We sought federal funding for this initiative in 2001 and Montana became a successful pilot project for the broader federal effort to assist state high-risk pools. However, the only steady source of funding for the program has come from the state because continued funding for the federal grant program for high-risk pools has not been reauthorized.

3. As we in Montana begin to study new reforms to address the health care crisis, we must do so tentatively, always testing the ERISA waters. Critics of health reforms may bring ERISA challenges (valid or not) against state laws, causing uncertainty, significant delay and significant litigation costs, even if the state ultimately prevails. If the states had the ability to apply to the Secretary of Labor for a waiver of preemption in advance of attempting certain reforms, most of that uncertainty, delay, and expense could be eliminated.

The new Montana joint resolution [HJ 48] proposes to study the advantages and disadvantages of mandating private universal coverage: for instance, perhaps a pay-or-play system, as well as the concept of a health insurance exchange. A health insurance exchange could make coverage more affordable and portable by allowing employees to choose their coverage from an exchange offering an array of products, and then carry that coverage with them if they leave that employer. Both of these ideas are significantly different from the current method of delivering health insurance coverage. All of the reform ideas emerging from the states, no matter how promising, must be subject to intense legal scrutiny and are sometimes discarded, simply because the risk of ERISA preemption is too great.

4. As with any study, the HJ 48 interim committee will need to collect data about health plans, benefits offered, number of individuals covered, amount of claims paid, and costs of coverage. ERISA generally prevents states from collecting data from self-funded health plans, and therefore states are left in the position of trying to find solutions for a problem when they have only half the information. State data collection should be saved from ERISA preemption.

5. Montana also has a dynamic ballot initiative process and I am certain that great strides can be made toward covering the uninsured through this process in 2008. I have talked to many stakeholders and found widespread interest in this approach. As we consider different policy options, the specter of ERISA preemption curbs the innovative possibilities.

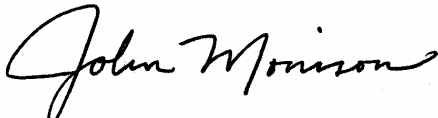
6. The Insure Montana program has not encountered any direct ERISA challenges. However, the plans offered through the purchasing pool are privately insured and have higher cost premiums because of premium tax and high-risk pool assessments. That means that the cost of supplementing those premiums is higher. Self-funded employer plans are able to maintain lower costs because they do not pay these taxes and assessments and also because those plans do not include state mandates. But the cost savings achieved on the self-funded ERISA side are simply shifted onto the narrowing slice of the market covered by private carriers, including Insure Montana.

7. ERISA preempts states from enforcing mandated coverages as to self-funded employer plans. Most of those mandates provide important preventative health care such as mammograms, diabetic services and supplies, immunizations and well-

child care for young children, newborn coverage and maternity coverage. Many individuals, who do not have coverage for these types of important preventative care items, cannot afford to obtain them on their own. Serious health problems can occur and result in costs of uncompensated health care being shifted to the rest of the population that pays for health insurance, both private and self-funded, or some of these individuals may end up in public programs like Medicaid, which all taxpayers must pay for.

From Maine to Montana, states are starting to get serious about ending the health care crisis. The laboratories of democracy are on the march, pioneering reforms. While there are many challenges that require the national authority and resources of Congress, we hope that your approach to health care will empower the states so that we can get out of the wagon and help you pull it over the hill.

Submitted on
May 21, 2007

A handwritten signature in black ink that reads "John Morrison". The signature is written in a cursive style with a large, looping initial "J".

JOHN MORRISON
State Auditor
Commissioner of Insurance and Securities