Nos. 06-1840, 06-1901

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RETAIL INDUSTRY LEADERS ASSOCIATION,
Plaintiff-Appellee
v.
JAMES D. FIELDER, JR.
Defendant-Appellant

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE AND REQUESTING AFFIRMANCE

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Secretary of the United States Department of Labor (the "Secretary") has primary enforcement authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. The Secretary's interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). The Secretary, therefore, has a strong interest in ensuring that ERISA's preemption provisions are correctly applied. The Secretary has authority to file this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

QUESTION PRESENTED

Whether the Maryland Fair Share Health Care Fund Act, which requires for-profit companies with more than 10,000 employees in Maryland to spend at least eight percent of total wages on "health insurance costs" or contribute the difference to a state Medicaid fund, "relates to" employee benefit plans within the meaning of ERISA section 514(a), 29 U.S.C. § 1144(a), and is, therefore, preempted.

STATEMENT OF THE CASE

The Maryland Fair Share Health Care Fund Act (FSHCFA) requires for-profit companies with more than 10,000 employees in Maryland to spend at least eight percent of total wages on "health insurance costs" or contribute the difference

to a state Medicaid fund. Health insurance costs are defined as "the amount paid by an employer to provide health care or health insurance to employees in the State to the extent the costs may be deductible by an employer under federal tax law" and include "payments for medical care, prescription drugs, vision care, medical savings accounts, and any other costs to provide health benefits as defined in § 213(d) of the Internal Revenue Code." Md. Code Ann., Lab & Empl. Tit. 8.5 § 101(d) (2006). The law also requires covered employers to make annual reports to the State's Secretary of Labor, Licensing, and Regulations concerning the number of employees in the State the prior year, the health insurance expenditures in the prior year, and the percentage of compensation spent on health insurance costs during the prior year. Id. at § 103(a). Failure to report results in a civil penalty of $250 for each day the report is not timely filed, and failure to make the required payment results in a $250,000 civil penalty. Id. at § 104. The Secretary of Labor, Licensing, and Regulations is authorized to adopt regulations that specify the information to be included in the annual report and to adopt other regulations implementing the law. No regulations have been adopted at this time.

The stated purpose of the FSHCFA is to reduce costs to Maryland's Medicaid program by requiring large employers to increase their expenditures on employee health care or to pay money to the Medicaid fund. There are four for-profit employers in Maryland that have 10,000 or more employees and, thus, fall

within the FSHCFA's scope. Wal-Mart, however, is the only company that allegedly spends less than eight percent of its in-state payroll on health insurance costs. Senator Miller, a co-sponsor of the law, stated that the law "takes people who should be getting health benefits at the workplace off the rolls and it requires those employers to provide it." Floor debate on Senate Bill 790, 2006 Leg., 421st Sess. (Md. January 12, 2006) (statement by Sen. Miller, co-sponsor of the law).

The Retail Industry Leaders Association (RILA) filed suit in the United States District Court for the District of Maryland to enjoin the application of the FSHCFA on the grounds, among other things, that it is preempted by ERISA.[1] RILA moved for summary judgment, and Maryland opposed RILA's motion and cross-moved for summary judgment.[2]

On July 19, 2006, the district court held that the FSHCFA is preempted by ERISA. The court held that the FSHCFA will "force Wal-Mart to increase its contribution[s] to its health benefit plan," and therefore conflicts with long-standing Supreme Court precedent holding that laws which impose benefit mandates on employers are preempted by ERISA. <u>Retail Indus. Leaders Ass'n v.</u>

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[1] RILA also alleged that the law violated the Equal Protection Clause of the federal constitution and a Maryland constitutional provision prohibiting "special laws" because the law was designed to affect a single employer, Wal-Mart.

[2] In addition to arguing that the FSHCFA was not preempted by ERISA, Maryland challenged RILA's suit on standing and ripeness grounds, and also challenged the court's jurisdiction under the Tax Injunction Act (TIA).

Fielder, 435 F. Supp. 2d 481, 495 (D. Md. 2006). Moreover, according to the court, the FSHCFA conflicts with ERISA's goal of permitting nationally uniform administration of employee benefit plans because it creates health care spending requirements that are not applicable in most other jurisdictions and that directly conflict with requirements in at least two other jurisdictions. Id. The court found that the law also requires nationwide employers to "segregate a separate pool of expenditures for its Maryland employees and structure its contributions – and employees' deductibles and co-pays – with an eye to how this will affect the Act's 8% spending requirement." Id.

The Court rejected the State's argument that recent Supreme Court precedent starting with New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) "changed the landscape" of ERISA preemption analysis such that the FSHCFA should not be held preempted. According to the district court, the state laws in Travelers and its progeny "lie at the periphery of ERISA analysis" while the FSHCFA lies "at [ERISA's] core." 435 F. Supp. 2d at 495. The court held that "[t]he Act is not merely tangentially related to ERISA plans but is focused upon them." Id. at 496.

The court rejected Maryland's argument, based on California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316 (1997), that the law did not mandate ERISA benefits because Wal-Mart had sufficient "non-ERISA

alternatives" for compliance with the eight percent requirement. First, the court held that Wal-Mart could not comply with the FSHCFA by providing health savings accounts (HSAs) because HSAs fall outside ERISA only if they are voluntarily established by employees, and Wal-Mart could not ensure that it would meet the eight percent requirement by contributing to them. 435 F. Supp. 2d at 497. Second, the court rejected the argument that the eight percent requirement could be satisfied through on-site first aid clinics, finding that the clinic argument was "utterly out of line with reality" and demeaned "the seriousness of purpose of the Maryland General Assembly." Id. Finally, the court held that the State's suggestion that Wal-Mart could simply pay the necessary amount into the State's coffers, while "theoretically true," was not a realistic option for an employer, but was instead a "Hobson's Choice" that no rational employer would pursue. Id. at 497-98.[3]

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[3] The court reached the ERISA issue after rejecting the State's jurisdictional arguments that the case was not ripe for judicial review and that RILA did not have standing to bring the suit on Wal-Mart's behalf. In addition, the court held that jurisdiction was not precluded by the Tax Injunction Act, holding that the FSHCFA was not a revenue raising measure, but was instead a regulatory scheme requiring Wal-Mart to pay eight percent of its payroll on employees' health care. However, the court rejected RILA's challenge to the FSHCFA on equal protection grounds. The Secretary does not address any of these non-ERISA issues in this brief.

SUMMARY OF ARGUMENT

The FSHCA is preempted by ERISA because it mandates that employers pay a certain level of health care benefits to their employees or pay a penalty to the State. ERISA allows employers to determine whether and when to establish health care benefit plans for their employees and the level of benefits to be provided. By requiring employers to pay eight percent of payroll in health care benefits to employees or suffer a penalty, the FSHCA impermissibly interferes with the goal of Congress to make employee benefit plan regulation exclusively a federal concern. It also exposes employers and plans to inconsistent and overlapping regulation by Maryland and other political subdivisions that have enacted or may choose to enact similar legislation.

There is no practical way for employers to comply with the FSHCA, other than paying money directly to the State, without creating or affecting ERISA-covered health plans. An employer cannot guarantee compliance with the FSHCA by establishing health savings accounts as suggested by the State of Maryland, because employee participation must be wholly voluntary in order to avoid ERISA coverage. Moreover, an employee is not eligible for an HSA unless he is covered by a high deductible health plan, which is generally an ERISA-covered plan. Similarly, it would be extraordinarily difficult for an employer to establish an in-house health clinic that provided sufficient benefits to comply with the FSHCFA

without creating or augmenting an ERISA-covered plan. Even if an employer could comply in part with the FSHCFA by these non-ERISA means, the establishment of such alternatives would have to be integrated with existing ERISA-covered plans and would be preempted for that reason alone.

ARGUMENT

THE MARYLAND FAIR SHARE HEALTH CARE FUND ACT RELATES TO EMPLOYEE BENEFIT PLANS AND IS PREEMPTED BY ERISA

ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). ERISA "sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990). ERISA defines an ERISA-covered "welfare plan" as "any plan, fund, or program which . . . is . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits . . . ." ERISA § 3(1), 29 U.S.C. § 1002(1).

"The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004). To this end, section 514(a) of ERISA provides that the Act "supersede[s] any and all State laws insofar as they . . . relate to any employee benefit plan" governed by

ERISA. 29 U.S.C. § 1144(a). This preemption provision is "'conspicuous for its breadth.'" Dillingham, 519 U.S. at 324 (quoting FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990)). Section 514 "indicates Congress's intent to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern.'" Travelers, 514 U.S. at 656 (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)). When Congress enacted ERISA's preemption provisions, it sought to ensure that "plans and plan sponsors would be subject to a uniform [system] of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives" and to avoid "requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." Ingersoll- Rand, 498 U.S. at 142.

The Supreme Court has held that ERISA section 514 should not be interpreted to "extend to the furthest stretch of its indeterminacy," preempting state laws of general applicability that have "only a tenuous, remote, or peripheral connection with covered plans." Travelers, 514 U.S. at 655, 661 (quoting District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 130 n.1 (1992)). It is well established, however, that ERISA preempts state laws that interfere with ERISA's core objective to "establish the regulation of employee welfare plans 'as exclusively a federal concern'" and to "eliminat[e] the threat of conflicting and inconsistent State and local regulation." Id. at 656-57 (internal quotations

omitted). Thus, for example, in Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001), the Supreme Court held preempted a state law requiring ERISA plan administrators to pay life insurance benefits to beneficiaries designated by a state law rather than by the governing ERISA plan document. The Court held the law preempted because "unlike generally applicable laws regulating 'areas where ERISA has nothing to say', which [the Court] upheld notwithstanding their incidental effect on ERISA plans, . . . this statute governs the payment of benefits, a central matter of plan administration." Id. at 147-48.

There are two categories of laws that "relate to" plans within the meaning of section 514(a) and are, therefore, preempted: first, state laws that have a specific "connection with" ERISA plans and, second, state laws that have a "reference to" ERISA plans. Dillingham, 519 U.S. at 324-25.[4] A state law has a "connection with" ERISA plans if it interferes with Congress's objective of avoiding "a

[4] Although this brief argues that the FSHCFA is clearly preempted under the "connection with" prong, it is also preempted because it has a "reference to" ERISA plans. A state law, such as the Maryland law, is preempted on the ground that it has a "reference to" ERISA plans if it "acts immediately and exclusively upon ERISA plans" or if "the existence of ERISA plans is essential to the law's operation." Dillingham, 519 U.S. at 325. The FSHCFA requires the payment of employee "health insurance costs" by an employer or payment of the difference into the state Medicaid fund. As discussed below, the payment of employee health insurance costs by an employer is likely, in most instances, to create an ERISA-covered employee benefit plan. Moreover, an employers' obligation to pay into the Maryland state Medicaid fund is measured by the amount paid, among other things, to ERISA-covered plans. The Maryland law, therefore, has an impermissible "reference to" ERISA-covered plans and is preempted.

multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." Travelers, 514 U.S. at 657. Such prohibited state laws include, among others, those that regulate "employee benefit structures or their administration." Id. at 658; see also Egelhoff, 532 U.S. at 147 (state law is preempted because it "binds ERISA plan administrators to a particular choice of rules" regarding designation of plan beneficiaries, which was characterized as a "core ERISA concern"); Raybestos-Manhattan, Inc., 451 U.S. at 523 (law prohibiting workers' compensation benefits from being used to offset pension benefits preempted because it eliminates one method for calculating benefits permitted by federal law); FMC Corp., 498 U.S. at 60 (Pennsylvania law that prohibited plans from requiring reimbursement from beneficiary's tort recovery preempted because it entitled Pennsylvania employees to benefits in excess of what the plan intended to provide and in excess of what the plan provided to employees in other states).

A. The FSHCFA effectively mandates that Maryland employers provide ERISA-covered benefits and, therefore, has an impermissible "connection with" ERISA plans.

The FSHCFA is preempted under the "connection with" prong because it effectively mandates that Maryland employers provide ERISA-covered benefits through ERISA-covered plans in aggregate amounts set by the State. Under the Maryland law, an employer has no choice but to expend eight percent of its payroll

on employee health costs, except to the extent that it is simply willing to turn the money over to the State of Maryland. Under ERISA, however, employers' arrangements for the provision of health, pension, and other employee benefits are subject to uniform federal regulation, not varying state laws and standards. The only way in which ERISA permits a state, even indirectly, to mandate benefits is through the regulation of insurance under ERISA § 514(b)(2), 29 U.S.C. § 1144(b)(2), which saves certain state insurance laws from preemption. While a state can regulate the content and coverage of insurance policies sold in the state, an employer retains the choice to establish a self-funded plan, such as the Wal-Mart plan, free from state insurance laws that mandate benefits, or even choose to provide no benefits at all. Indeed, ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B), specifically prohibits the states from deeming ERISA plans to be insurers for purposes of the savings clause.

Maryland does not claim that the FSHCFA is an insurance law and consequently cannot avoid ERISA preemption of the FSHCFA on that basis. It is a fundamental tenet of ERISA preemption that states may not mandate ERISA plan benefits outside the context of insurance regulation. See Shaw, 463 U.S. at 96-97 (New York law that mandated certain pregnancy benefits "relates to" plans and is, therefore, preempted); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (law mandating employer-provided insurance for mental health benefits

"clearly 'relate[d] to' welfare plans governed by ERISA . . . ." but was saved by ERISA's insurance savings clause); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 13 n.8 (1987) ("state laws requiring the payment of benefits also 'relate to a[n] employee benefit plan' if they attempt to dictate what benefits shall be paid under a plan"); Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 365, 383-84 (2002) (Illinois insurance law mandating external review of benefit claims, while saved under insurance savings clause, was related to ERISA plans "beyond serious dispute"); Stone & Webster Eng'g Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982), aff'd, 463 U.S. 1220 (1983) (ERISA preempts Connecticut statute that requires an employer to provide health and life insurance coverage for a former employee receiving workers compensation); Am. Med. Sec., Inc. v. Bartlett, 111 F.3d 358, 360 (4th Cir. 1997) (ERISA preempts Maryland regulation seeking to "force state-mandated health benefits on self-funded ERISA plans").

The FSHCFA, therefore, has an impermissible "connection with" ERISA plans because it effectively mandates the payment of ERISA benefits on pain of penalty. By mandating a certain level of benefits, the FSHCFA intrudes on a core area of ERISA concern: employers' authority over whether, and on what terms, to sponsor ERISA-covered plans. As the Supreme Court has noted, ERISA "does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free

under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." Curtiss-Wright v. Schoonejongen, 514 U.S. 73, 78 (1995). By setting an aggregate amount (by percentage of payroll) affected employers must spend on employee health benefits, Maryland is taking away employers' fundamental authority over whether, and on what terms to sponsor a plan, and potentially subjecting employers to the competing demands of a multiplicity of state and local regulatory schemes. Accordingly, the FSHFCA is preempted.

B. Maryland's characterization of its mandated benefits law as a payroll tax does not save the law from ERISA preemption.

Despite the Maryland law's clear impact on employee benefits regulated by ERISA, the State suggests that the law may escape preemption based on its status as a "payroll tax." Maryland argues that the FSHCFA is akin to an eight percent payroll tax payable to the State's Medicaid fund, which allows the taxpayer a dollar for dollar credit for any funds expended for employees' health care. Because employers can pay the money to the state, Maryland asserts that an employer need not create or change an ERISA-covered health plan and, therefore, the law is not preempted.

For purposes of ERISA preemption analysis, however, it does not matter whether the eight percent payment is characterized as a tax, penalty, or fee because ERISA § 514(a) covers all of these by declaring that it "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan

. . . ." 29 U.S.C. § 1144(a). Accordingly, when Congress amended ERISA § 514 to add a clause saving the Hawaii Prepaid Health Care Act from preemption in 1982, it clarified that "Congress intended tax laws to be treated like every other state law, receiving the same 'relates to' analysis . . . ." Retirement Fund Trust v. Franchise Tax Bd., 909 F.2d 1266, 1276 (9th Cir. 1990) (discussing 29 U.S.C. § 1144(b)(5)(B)(i)). "The conference committee report explained: 'Preemption is *continued* with respect to . . . any State tax law relating to employee benefit plans.'" Id. at 1278 (quoting H.R. Conf. Rep. No. 97-984, 97th Cong., 2d Sess., 18, *reprinted in* 1982 U.S. Code Cong. & Admin. News 4598, 4603). Similarly, it is well understood that the regulatory impact of revenue raising laws, even when denominated as taxes, is subject to scrutiny for preemption by applicable provisions of federal law.[5] Thus, the merits question on ERISA preemption is the same regardless of whether the FSHCFA is a tax or not.

However one characterizes the eight percent obligation, its clear effect is to compel affected Maryland employers to provide employee benefits, as defined in section 3(1) of ERISA, 29 U.S.C. § 1002(1), which undoubtedly will be provided primarily, if not exclusively, through ERISA-covered plans. It would make little sense for an employer to pay into State coffers money that could be paid to its own

[5] See, e.g., Commonwealth Edison Co. v. Montana, 453 U.S. 609, 634 (1981) (state severance tax on coal production held not preempted under federal laws governing mineral lands leasing and coal production based on examination of

employees. It is difficult to imagine an employer who would view the "option" of paying eight percent to the State of Maryland as a rational alternative to providing the mandated benefits to its own employees and deriving the attendant employee morale and retention benefits. Thus, the choice Maryland offers employers subject to the FSHCFA is no real choice at all. See Travelers, 514 U.S at 664 ("there might be a point at which an exorbitant tax leaving consumers with a Hobson's choice would be treated as imposing a substantive mandate").

Accepting Maryland's argument would permit an end-run around the principle that the states may not mandate ERISA-covered benefits. If Maryland's argument were correct, states could impose all kinds of mandates on plans and plan sponsors with penalties for noncompliance and argue that the mandates were not preempted because the plan or plan sponsor could always choose to pay the penalty. The fundamental goal of ERISA preemption -- the establishment of a uniform regulatory regime over employee benefit plans -- would be negated. Moreover, if Maryland's analysis were correct, there would be no basis for distinguishing health benefits from any other ERISA-covered benefits, such as pension benefits. Maryland could just as easily pass a state law mandating particular pension benefits and requiring particular pension plan structures under

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"specific federal statutes with which the state law is claimed to conflict").

the guise of requiring employers to pay a certain amount of its payroll for specified employee pension expenses or pay the difference to the State.

C. Maryland's interpretation of the Dillingham decision is incorrect.

Relying on Dillingham, 519 U.S. 316, the State suggests that the FSHCFA is not preempted because employers could provide the required health benefits through non-ERISA means. In Dillingham, the Supreme Court upheld a California prevailing wage law allowing state public works contractors and sub-contractors to pay lower apprenticeship wages to employees participating in state-approved apprenticeship training programs. The Court found that the state prevailing wage law was a generally applicable law "regulating 'areas where ERISA has nothing to say'" rather than a statute that "governs the payment of benefits, a central matter of plan administration." See Egelhoff, 532 U.S. at 147-48 (describing Dillingham). In the particular context of California's prevailing wage law, the Court relied upon the fact that employers had a choice of using in-house training, which is not covered by ERISA, as opposed to ERISA-covered apprenticeship plans, in order to pay the lower wage rate, as a basis for avoiding ERISA preemption.

The state law at issue in Dillingham did not require employers to pay any specific type of benefits, or any benefits at all, in order to satisfy the prevailing wage rate. Instead it was a "total package" law, which gave credit for both wages

and benefits in determining whether an employer complied with the prevailing wage law. See WSB Elec., Inc. v. Curry, 88 F.3d 788 (9th Cir. 1996). These total package laws (sometimes called two-tier laws) have been held non-preempted by the courts of appeals. As the Ninth Circuit noted in WSB Electric, the California prevailing wage law did not "force employers to provide any particular employee benefits or plans, to alter their existing plans, or to even [offer] ERISA plans or employee benefits at all." Id. at 793. See also Burgio & Campofelice, Inc. v. New York State Dep't of Labor, 107 F.3d 1000 (2d Cir. 1997); Keystone Chapter, Associated Builders v. Foley, 37 F.3d 945 (3d Cir. 1994); Minnesota Chapter of Associated Builders v. Minnesota Dep't of Labor, 47 F.3d 975 (8th Cir. 1995).

The FSHCFA, however, is nothing like the "total package" law at issue in Dillingham. Instead, by focusing exclusively on "health insurance costs" as the only type of compensation deserving of credit under the FSHCFA's scheme, the law is far more analogous to so-called "line item" prevailing wage laws -- laws which specify the benefits that employers must pay and which the courts have uniformly found preempted. For example, the Second Circuit held that a New York prevailing wage law was preempted when it required employers to pay health and pension benefits to employees on public works projects equivalent to those prevailing in the locality because under ERISA, "'private parties, not the Government, control the level of benefits.'" Gen. Elec. Co. v. New York State

Dep't of Labor, 891 F.2d 25, 28 (2d Cir. 1989) (quoting Alessi v. Raybestos-Manhattan, 451 U.S. at 511). The Second Circuit found the New York prevailing wage law preempted even though the employer could have complied with the law by giving employees the cash costs rather than the actual benefit. Id. at 28; see also Local Union 598, Plumbers Indus. & Pipefitters Journeymen & Apprentice Training Fund v. J.A. Jones Constr. Co., 846 F.2d 1213 (9th Cir.), aff'd, 488 U.S. 881 (1988) (preempting Washington prevailing wage law that mandated a particular level of contributions by employers to employee benefit plans).

In addition, it was important to the Dillingham Court that the California apprenticeship standards were formulated under the aegis of the Fitzgerald Act, 29 U.S.C. § 50, which specifically provides for a state role in the development of apprenticeship standards, and the California standards were consistent with that law. Dillingham, 519 U.S. at 332 n.10 (characterizing California's apprenticeship standards as substantially similar to the federal standards). Section 514(d) of ERISA, 29 U.S.C. § 1144(d), specifically preserves other federal laws from ERISA preemption which would include the Fitzgerald Act. While Maryland correctly argues that Congress also envisioned a role for state governments in administering the Medicaid scheme, that Congressionally mandated role extends only to Maryland's administration of its public Medicaid programs. Congress did not give the states a license to develop or establish private sector employee benefit

standards, but rather left the regulation of such core-ERISA matters to the federal government.[6]

Moreover, even if Maryland could show that Dillingham is apposite, Maryland has not plausibly suggested any non-ERISA means, short of paying all of the money to the State, by which an employer could satisfy the law. As will be discussed below, unless an employer wants to pay the money directly to the State as a means of complying with the FSHCFA, it will have little choice but to establish and maintain ERISA-covered plans, coordinate the provision of any non-ERISA health payments with the benefits provided under the employer's ERISA plans, and -- if other states or localities follow Maryland's lead -- administer its ERISA plans in accordance with the dictates of a multiplicity of regulatory regimes. For all of these reasons, the FSHCFA is wholly distinguishable from the prevailing wage law upheld in Dillingham, and is preempted.

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[6] To the extent that Congress intended state Medicaid programs to intrude on ERISA-covered plans, it specifically provided for it. For example, Section 609(b)(3) of ERISA, 29 U.S.C. § 1169(b)(3), requires an ERISA plan to pay for covered benefits as required by State law under which a State, having made Medicaid payments, acquires the rights of plan participants to receive plan benefits relating to such payments. ERISA section 514(b)(8)(A), 29 U.S.C. § 1144(b)(8)(A), provides that ERISA will not preempt actions "with respect to which the State exercises its acquired rights under [section 1169(b)(3) of this title] with respect to a group health plan." Had Congress also intended for states to be able to mandate ERISA health benefits in order to pay for Medicaid expenses, it would and could have done so.

D. Compliance with the FSHCFA effectively compels the establishment and maintenance of ERISA-covered plans and, under the FSHCFA, the provision of any non-ERISA benefits would be inextricably intertwined with the administration of ERISA-covered plans.

Maryland suggests that ERISA preemption does not apply to a State-mandated benefits law so long as the State can articulate a non-ERISA means of compliance, no matter how unlikely an employer would be to choose the non-ERISA method of compliance. Even if one were to misapply Dillingham in this way, however, it would be virtually impossible for employers to satisfy Maryland's eight percent requirement without creating and maintaining ERISA-covered plans, and without coordinating the administration of benefits under those plans with the administration of the various add-ons necessary to top the plans up to the eight percent requirement. As a result, the FSHFCA deprives the employer of the freedom ERISA grants "for any reason at any time, to adopt, modify, or terminate welfare plans." Curtiss-Wright, 514 U.S. at 78. The non-ERISA options suggested by Maryland are either too limited to reach the eight percent level without creating an ERISA-covered plan or cannot be offered unless an employer already has an ERISA-covered plan.

In Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, the Supreme Court observed that states could not require employers to integrate the administration of ERISA-covered plans into state-law benefit schemes without triggering issues of ERISA preemption. In Fort Halifax, the Court held Maine's severance payment

law not preempted because it only required one-time payments as opposed to an ongoing administrative scheme. The Court contrasted Maine's law with the Hawaii Prepaid Health Care Act which mandated employee health benefits and was held preempted by ERISA in Standard Oil v. Agsalud, 633 F.2d 760 (9th Cir. 1980), summarily aff'd, 454 U.S. 801 (1981). The Fort Halifax Court explained that the Hawaii law was preempted because it either required the creation of a new plan or the integration of a state-mandated ongoing benefit plan with an existing plan:

> If the employer sought to achieve administrative efficiencies by integrating the Hawaii plan into its existing plan, different components of its single plan would be subject to different requirements. If it established a separate plan to administer the program directed by Hawaii, it would lose the benefits of maintaining a single administrative scheme. Second, if Hawaii could demand the operation of a particular benefit plan, so could other States, which would require that the employer coordinate perhaps dozens of programs.

482 U.S. at 13.[7]

Even if Maryland is correct that employers could comply, in part, with the FSHCFA through non-ERISA means, it would impose similar coordination problems on Maryland employers. To the extent that an employer like Wal-Mart provides health care through a single nationwide ERISA-covered health plan, the employer choosing to meet the eight percent requirement by providing health care

[7] It took a special Act of Congress to save the Hawaii mandated benefits law from preemption. ERISA § 514(b)(5), 29 U.S.C. § 1144(b)(5). See generally Retirement Fund Trust, 909 F.2d at 1276-78.

through non-ERISA means would still have to coordinate the non-ERISA health benefits with the ERISA benefits to avoid duplication. Moreover, in order to meet the entire eight percent requirement through non-ERISA means, an employer would need to reduce or eliminate benefits provided under its existing ERISA plan.

Like the Hawaii law, the FSHCFA would also interfere with "nationally uniform plan administration" by requiring employers doing business in Maryland to comply with different administrative and reporting requirements and to offer a different level of benefits with respect to Maryland employees than to employees in the other 49 states. These concerns also are remarkably similar to the administrative and coordination concerns identified by the Supreme Court when it found the state law preempted in Egelhoff; the only difference being that the FSHCFA would create coordination problems regarding the amount of benefits owed, whereas the law in Egelhoff raised problems regarding the identity of the beneficiary to be paid. See Egelhoff, 532 U.S. at 147-51 (discussing administrative and coordination concerns raised by state law purporting to govern identity of life insurance beneficiaries). If anything, the coordination problems presented by the FSHCFA would be greater than in Egelhoff because medical claims are incurred repeatedly over the life of a participant (thus causing coordination issues to recur continually), whereas the coordination problems

presented in Egelhoff involved life insurance which is paid only one time for each plan participant.

Furthermore, it would be virtually impossible for a Maryland employer to satisfy the eight percent requirement without maintaining an ERISA plan. As noted above, ERISA defines a "welfare plan" as "any plan, fund, or program which . . . was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits . . . ." ERISA § 3(1), 29 U.S.C. 1002(1). In determining whether a plan exists, most circuits, including the Fourth Circuit, have adopted the test set forth by the Eleventh Circuit in Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) (en banc). See Elmore v. Cone Mills, 23 F.3d 855 (4th Cir. 1994). "In determining whether a plan, fund, or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." Donovan v. Dillingham, 688 F.2d at 1373. Under this test, the courts focus on evidence that a decision to provide benefits has become a reality by employer conduct "financing or arranging to finance or fund the intended benefits, establishing a procedure for disbursing benefits, assuring employees that the plan or program exists . . . ." Id.

An important theme running through the cases following Donovan v. Dillingham is that courts have generally found there to be an ERISA plan where the employer pays for some or all of the benefits.[8] The FSHCFA on its face requires that an employer pay for "health insurance costs." In order to determine whether it was in compliance with the Maryland law, the employer would have to maintain some record of the amount of money spent, the employees who received the money, and some record that the money was spent on what Maryland defines as "health insurance costs." These minimal requirements for compliance with the FSHCFA would be enough to satisfy the Dillingham test for an ERISA-covered health plan.[9]

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[8] See, e.g., Donovan v. Dillingham, 688 F.2d at 1373 ("the purchase of insurance does not conclusively establish a plan, fund, or program, but the purchase is evidence of the establishment of a plan, fund, or program; the purchase of a [group] policy or multiple policies covering a class of employees offers substantial evidence that a plan, fund, or program has been established"); Kidder v. H & B Marine, Inc., 932 F.2d 347, 353 (5th Cir. 1991) ("H & B Construction's payment of premiums on behalf of its employees is substantial evidence that a plan, fund, or program [was] established") (internal quotation omitted); Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178, 185 (6th Cir. 1992) (holding that the employer "established and maintained a plan . . . for the purpose of providing health benefits to his employees" by purchasing a group health insurance policy for their benefit); Postma v. Paul Revere Life Ins. Co., 223 F.3d 533, 537 (7th Cir. 2000) ("[a]n employer establishes or maintains a plan if it enters a contract with the insurer and pays its employees' premiums").

[9] The Department of Labor has enacted a "safe harbor" regulation which permits employers to facilitate the voluntary purchase of health insurance by employees with the employees' own money without establishing an ERISA plan, so long as certain conditions are satisfied. The regulation, 29 C.F.R.

The suggestion that Maryland employers could comply with the FSHCFA by providing health savings accounts (HSAs) for their employees is also without merit. In 2004, the Department of Labor issued Field Assistance Bulletin 2004-1 (FAB 2004-1) (Apr. 7, 2004) (Joint Appendix 349-51) which opined that a health savings account is not necessarily an ERISA-covered plan, even if an employer makes contributions, so long as certain conditions are met. As the district court explained, however, "HSAs fall outside the definition of ERISA plans only if 'the establishment of the HSAs is completely voluntary on the part of the employees.'" [quoting FAB 2004-1] Therefore, an employer could not ensure its compliance with the Act by contributing to HSAs; whether or not it met the statutory expenditure threshold would depend upon whether the HSAs were its employees' preferred means of receiving health benefits." 435 F. Supp. 2d at 497.

Under the HSA framework, the only way for the employer to ensure compliance with the Maryland law would be to create an arrangement inextricably intertwined with ERISA-covered plans. An employee is not an eligible individual for an HSA unless he or she is covered by a high deductible health plan (HDHP) and is not also covered by more comprehensive, disqualifying health coverage. See 26 U.S.C. § 223(c)(1) (definition of eligible individual). An employer's

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§ 2510.3(j), is limited to situations where no contributions are made by an employer and, therefore, would not apply to arrangements made to comply with the FSHCFA.

purchase of HDHP for its employees, like any other purchase of health insurance by an employer, is generally an ERISA-covered arrangement. See, supra, note 5; Field Assistance Bulletin 2004-1 at 1-2 & n.7. Even if an employer could provide both an HDHP and an HSA without creating an ERISA-covered plan by simply reimbursing employees for the costs, employees would have to voluntarily agree to select HDHP coverage and pay the premiums from their own funds, and many would likely choose not to do so. Moreover, the employer would have to terminate its employees' participation in its current ERISA health coverage because that coverage would make the employees ineligible for an HSA. 26 U.S.C. § 223(c)(1).

It is also virtually impossible for employers in Maryland to comply with the FSHCFA by setting up in-house health clinics, as has been suggested. The Department of Labor's regulations provide an exemption from plan coverage for onsite health clinics, but only "for the treatment of minor injuries or illness or rendering first aid in case of accidents occurring during working hours." 29 C.F.R. § 2510.3-1(c)(2). It is difficult to see how in-house health clinics could provide the level of expenditures necessary to comply with the FSHCFA and remain within the exemption provided by the regulation. Dep't of Labor Opinion Letter, No. 83-35A, 1983 WL 22520, at *2 (June 27, 1983) (in-house substance abuse and mental health assistance program was an ERISA welfare benefit plan not excluded under Section 2510.3-1(c)(2) because the benefits were "benefits in the event of sickness"

under ERISA § 3(1), the benefits were offered not just to employees but to employees' families, and the benefits covered problems that were more serious than "minor injuries").

Accordingly, there is no way that an employer can comply with the FSHCFA, short of paying money directly to the State, without creating or affecting an ERISA-covered employee benefit plan. The policy of ERISA is to leave such choices to employers and, in particular, to enable employers to create nationally applicable benefit programs that do not have to be tailored to the varying provisions of each state's law. The Maryland law directly compels employers to provide ERISA-covered benefits and thereby regulates matters which Congress chose to subject to a uniform federal regulatory scheme.

CONCLUSION

For the reasons stated above, the decision of the district court holding that the FSHCFA is preempted by ERISA should be affirmed.

Respectfully submitted,

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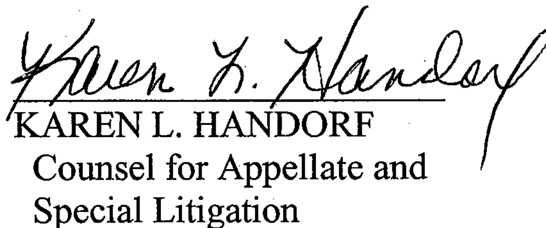

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(s) Karen R. Handay

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I hereby certify that on this 6th day of November 2006, 2 copies of the Brief of the Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellee and Requesting Affirmance were served to the parties listed below via regular mail to:

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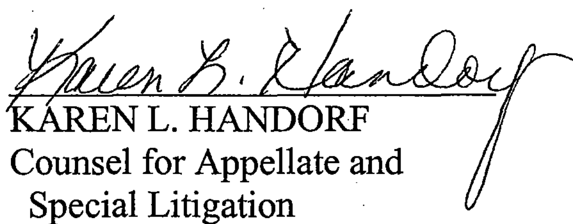

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