



# EBRI News

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## New Research from EBRI:

### **Study Finds ERISA Health Pre-emption Working as Intended** *Change in Law Could Reduce Number of Employers Offering Benefits in the Future*

WASHINGTON—The primary federal law governing employment-based health and retirement benefits is working as intended in preventing multi-state employers from potentially having to meet 50 different sets of health plan regulations, according to an analysis published today by the nonpartisan Employee Benefit Research Institute (EBRI).

Efforts to change the 34-year-old law, as some propose, could reduce the number of employers offering health benefits in the future, the analysis adds.

The analysis, in the February 2008 *EBRI Issue Brief*, reviews the history, intent, and major case law concerning the frequently debated Employee Retirement Income Security Act (ERISA) of 1974, which—despite its name—covers both employment-based retirement *and* health benefits in the private sector. The full document is available on EBRI's Web site at [www.ebri.org](http://www.ebri.org)

Under ERISA, the regulation of employment-based health benefit plans has evolved into a system in which both federal and state laws play important roles, the analysis says. As a result of a series of Supreme Court decisions, health benefit plans that purchase coverage from insurance companies (insured plans) are subject to ERISA regulation directly at the federal level and indirectly at the state level, while self-insured plans (typically only very large employers) are regulated exclusively at the federal level. The important distinction is that ERISA pre-empts self-insured plans from state coverage mandates.

Those who want to change ERISA argue that the law's pre-emption provisions prevent state and local governments from regulating employment-based group health plans, thereby blocking comprehensive health insurance reform. Calls to change ERISA have grown since the failure of federal health reform in the 1990s. But greater state regulation of health benefits "could ultimately prove to be self-defeating if employers decide to get out of the game" because of the higher costs those regulations can impose, the analysis concludes.

Several recent efforts to expand health coverage have ended with federal courts striking down local or state proposals on the grounds that they ran afoul of ERISA's pre-emption provisions. These cases have involved "fair share" laws which generally required employers to pay into a state fund if they paid less than a specified percentage of payroll toward health benefits or did not provide health insurance coverage at all.

Federal courts have struck down such “fair share” laws in the state of Maryland and Suffolk County, NY. A three judge panel of the Ninth Circuit Court of Appeals, in an unusual move, allowed a San Francisco “fair share” ordinance to be enforced while the District Court’s decision invalidating it on ERISA pre-emption grounds was under appeal (the District Court had issued a “stay” of the San Francisco ordinance). The full Court of Appeals is expected to issue its decision later this year. The Ninth Circuit panel set aside the stay, meaning the San Francisco ordinance can be enforced in the meantime. Massachusetts has adopted a comprehensive plan, funded in part by mandatory employer contributions, that is aimed at insuring all residents of the state.

“It is clear from the case law,” the analysis says, “that ERISA puts limits on the states’ ability to carry out health insurance reforms. ERISA pre-emption has prevented individual states and localities from mandating a minimum level of coverage for employment-based plans, and, so far, appears to prevent the states from mandating that employers provide health benefits. For employers operating in multiple states, this is exactly what ERISA was supposed to do—prevent multi-state employers from having to meet potentially 50 different sets of regulations.”

Looking ahead, the authors found that, as states pass more health care mandates on insured plans, more employers will be forced to consider self-insuring their health benefit plans as a response to the “significantly growing regulatory costs” of the mandates. ERISA would pre-empt those mandates if the employers self-insured. And, as the cost of insured coverage rises, smaller employers that cannot afford to self-insure may consider dropping coverage entirely.

The cost of state mandates significantly lowers the probability that small firms will offer health benefits, the analysis says. Roughly 18 percent of businesses that are currently without coverage would likely sponsor coverage but for state mandates, according to data the analysis cites. “Because benefit mandates can apply only to insured coverage, large employers can immunize themselves from these cost-drivers by self-insuring.” The analysis notes the proportion of self-insured health plans has been growing in recent years.

ERISA covers all private-sector health plans, whether they are self-insured or fully insured. EBRI estimates that 132.8 million people in the United States were in ERISA plans in 2006. Of the 132.8 million, some 73 million (55 percent) were in self-insured plans, which have grown in recent years but remain much more prevalent among larger firms.

The full February 2008 *EBRI Issue Brief*, made possible with support from the U.S. Chamber of Commerce, is available at [www.ebri.org](http://www.ebri.org)

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