



## **Employer Health Benefits Notification Law Preempted by ERISA**

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### **For Discussion Only**

In 2007, the New Jersey Department of Labor published regulations implementing N.J.S.A. 34:A-16-19: An Act Concerning Notification of Health Benefits Plans. The law requires employers who offer insured health benefit plans to employees through a health care insurer to provide notice in cases of plan termination or when changing health care plans. The law does not apply to self-insured plans or employers that participate in a joint insurance fund. The law also requires health insurance carriers to provide employers with notice of premium rate increases.

In enacting the law, the Legislature noted that "it is a disservice to the working people of this State not to require that an employer provide prior notification to its employees when the employee health benefits plan will be terminated, for whatever reason." However, the Act and the regulations promulgated there under are most likely preempted by the Employee Retirement Insurance and Security Act (ERISA) to the extent that the administrative burden imposed on employers is not a valid insurance regulation.

ERISA, a federal statute, was passed in 1974. The purpose of ERISA is to "promote the interests of employees and their beneficiaries in employment benefit plans." ERISA regulates employee benefit plans of private employers. The comprehensive statutory regulation prescribed by ERISA affects over eighty-five percent of non-elderly American workers who have private health insurance through employee benefit plans.

To achieve uniformity by supplanting an assortment of federal labor laws and state regulations, Congress included an express preemption provision in ERISA. Section 514(a) of ERISA provides for the provisions of Title I and IV to "supersede any and all State laws" so far as "[the State laws] relate to any employee benefit plan."

Thus, ERISA preempts "any and all State laws insofar as they . . . *relate to* any employee benefit plan covered by ERISA." The purpose of ERISA § 514(a) "is to enable employers to establish a

uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001). In determining whether a state law "relates to" a plan, the Supreme Court has looked to whether the state law has a "connection with or reference to" an ERISA-covered plan. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983).

A state law has a "reference to" an ERISA-covered plan if the law specifically refers to such a plan; "acts immediately and exclusively upon" the plan; or if the plan's existence "is essential to the law's operation." *Cal. Div. of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 519 U.S. 316, 324-25 (1997). State laws that "reference" ERISA plans are preempted *per se*, without regard to whether they are viewed as consistent or inconsistent with the goals of ERISA. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988).

Under the New Jersey law, an employer that provides an insured health benefits plan – in other words, an ERISA plan - which pays or provides hospital and medical expense benefits to its employees in New Jersey, shall provide 30 days' prior notice to those employees before termination of the plan. However, in the case where an employer is changing health benefit plans as opposed to eliminating coverage altogether, the employer must immediately notify their employees in writing of the change upon receipt by the health insurer that its employees will be covered by the new plan.

"Change" means any modification to a health benefits plan, including a modification to the level of benefits within an existing health benefits plan, whether that modification results in an increase or diminution in the level of benefits, or a change in the identity of the carrier or health insurer, whether that change in carrier or health insurer results in an increase, diminution or zero-net-effect in the level of benefits.

"Immediately" means: on or before the end of the first scheduled work day following receipt of notice from the health insurer.

In either the case of a plan termination or changing plans, the employer shall provide such notice in writing, include the effective date of the plan termination or change, provide the name and contact information of the individual to whom the employee may direct questions, and, in the case of a plan change, a description of the change. The employer must be able to show verifiable proof that such notice was delivered.

The law is enforced by New Jersey Department of Labor. The Department has the authority to enter any establishment or field site of any employer if there is reason to believe that a violation has occurred. Further, employers are required to permit the questioning, in private, of any employee or manager. The Department may also review relevant records. Violations are punishable by monetary penalties, not to exceed \$200 per employee covered by the health benefits plan.

For the renewal of a health benefits plan for which the premium rate will increase, a health insurance carrier shall provide that there will be an increase for the renewal of the plan and 60 days' prior notice of the amount of the increase to the employer that purchased that plan.



It is well settled that if a state law or regulation specifically refers to ERISA plans the state law would be preempted by ERISA. Likewise, if the state law directly regulated the administration of ERISA plans or the benefits available under such plans, the state law would be preempted.

However, ERISA does permit states to regulate insurance. In 1999, *Unum Life Ins. Co. Of America v. Ward*, the U.S. Supreme Court addressed the scope of the insurance "savings clause." Under the court's common sense test, laws which regulate insurance are laws that are "specifically directed toward the industry," as opposed to laws that "just have an impact on the industry." Factors to consider are: (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities in the insurance industry.

It is clear that the New Jersey law specifically refers to ERISA plans and imposes an administrative burden on employers administering such plans. The law also imposes penalties on employers for noncompliance. It also requires insurance carriers to provide notice to employers of rate increases.

In *Armiger v. Kiewit Construction Company*, a federal court for the Northern District of California found that § 2807 of the California Labor Code, which required employers to give individuals notice of the right to continue ERISA governed health insurance was preempted by ERISA.

In 1996, the Michigan Department of Labor issued an opinion that indicated the portion of a Minnesota state law requiring an employer to provide notice of state life insurance continuation rights was preempted by ERISA. See ERISA Opinion Letter 96-03A (Feb. 20, 1996).

To the extent that the law requires health insurance carriers to provide employers with notice of premium rate increases, it is most likely a valid regulation of insurance. However, to the extent that it imposes the burden on employers of notifying employees in advance of plan changes, the law more likely than not is preempted by ERISA.