

ERISA Considerations in Connecticut Health Reform: An Overview

Randall R. Bovbjerg, J.D.
The Urban Institute,[†] Washington, DC

Presentation to Session of Connecticut Authorities
Health Care Access / HealthFirst CT
Hartford, CT, May 14, 2008

[†] standard disclaimer applies

Why Care about ERISA?

- ❑ ERISA governs employer/union health benefits plans, which are mainstay of coverage
- ❑ States often want to maintain existing coverage while expanding to currently uninsured
- ❑ Health plan assessments are often seen as a potential source of revenue
- ❑ Courts have invalidated some state insurance initiatives, on ERISA grounds
 - mandates to provide insurance
 - some rules about managed care

What Is E.R.I.S.A.?

- ❑ Essence Really Is Simple, Actually
- ❑ The Employee Retirement Income Security Act of 1974, as amended, 29 U.S. Code chapt. 18, ...
- ❑ ...creates new federal regulation of “employee benefits plans” (pensions more than health) ...
- ❑ ... and blocks state regulation, even if not in direct conflict with any federal rules
- ❑ Therefore, states must act carefully in any rule affecting employee benefits plans

Key Things to Know

- ❑ What ERISA reserves to federal authority, what is left to states
- ❑ Lawyerly lingo: four key clauses
 - supremacy
 - preemption
 - savings
 - deemer

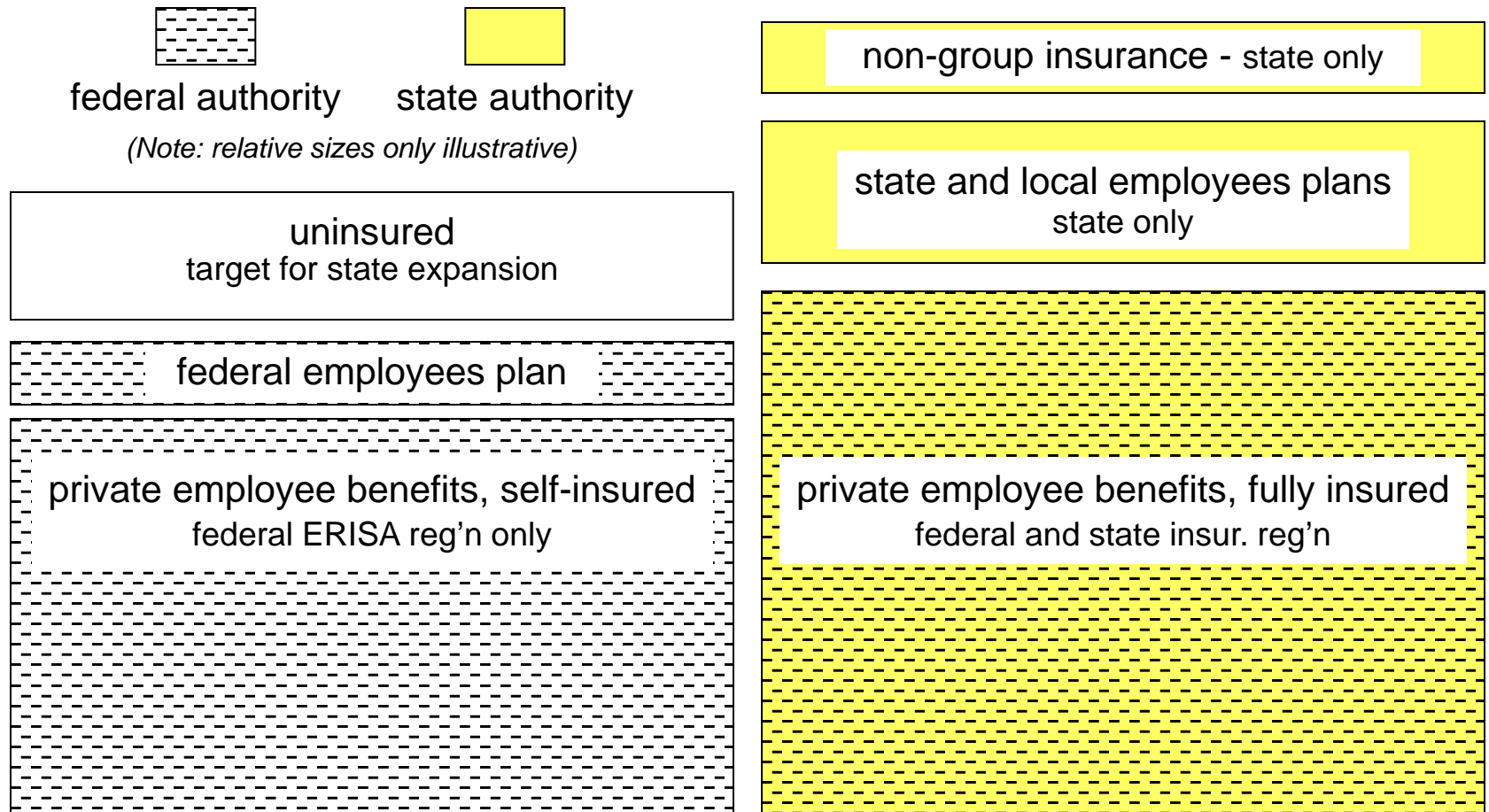
Broadly Preempts State Law

- ❑ ERISA supercedes “any and all State laws” ...
 - incl. statutes, regulations, judicial determinations, etc.
 - known as the “preemption clause” of ERISA
 - under “supremacy clause,” federal power trumps state
- ❑ ... that “relate to” ...
 - court interpretations have evolved (more below)
- ❑ ... “any employee benefit plan”
 - includes health benefits
 - private plans, not public or church plans
 - whether “ERISA plan” is insured or self-insured
- ❑ Very broad language of preemption ...
 - encourages benefit provision, allows uniform operations

Exceptions

- ❑ States may continue to regulate insurance, banking, and securities
 - these traditional state functions are “saved” from preemption, so this is the “savings clause” of ERISA
- ❑ Thus, states may to some extent indirectly affect employer plans by regulating insurance
 - litigation has defined permissible foci of regulation
- ❑ However, states may not deem private employer or union plans to be “insurance”
 - known as the “deemer” clause
 - states thus cannot regulate self-insured benefits

State & Federal Authority



Source: adapted from Butler, *ERISA Primer*, NASHP 2000

Breadth of “Relating to” Preemption

- ❑ Courts through mid-1990s minimized state power
 - Relating meant referring to ERISA plans or being connected to them because a challenged law:
 - addressed subjects similar to ERISA’s
 - regulated ERISA plans’ structure, operations
 - imposed costs on plans
 - ordinarily, “relate” includes relatively minor relations
- ❑ Landmark mid-1990s Sup. CT. cases cut states more slack:
 - allowed (other) traditional state activities to affect plans so long as costs imposed are not substantial
 - Hospital surcharges OK even though paid by ERISA plans or their insurers

So, What's this All Mean for Health Reform?

(1) No-No's for State Action

- ❑ Mandating that employers or unions provide employee benefits
- ❑ Taxing ERISA plans
- ❑ Directly regulating ERISA plans
 - eg, minimum employer share of premium, solvency requirements, benefits
- ❑ Explicitly targeting ERISA plans
- ❑ Imposing substantial costs on ERISA plans indirectly, through other regulations

Meaning for Health Reform, cont'd

(2) Likely Permissible State Actions

- ❑ Taxation of
 - fully insured health plans
 - health care providers, or
 - employer payrolls
- ❑ Providing subsidy usable for any health benefits
- ❑ Providing credit against payroll tax for costs of (tax-approved) health benefits
 - Important: should not be transparent attempt to force offer of coverage; should not set quasi-regulatory standards to qualify for credit

Practical Advice

- ❑ ERISA facilitates challenges to state power
- ❑ Judges follow the news
- ❑ Use traditional state powers and target broadly, not narrowly at ERISA plans
- ❑ Share burden of funding, don't overburden challengers under ERISA
- ❑ Focus on revenue, not regulation
- ❑ Engage in preventive lawyering

End

Time for questions

A Few Citations

Employee Retirement Income Security Act of 1974, as amended, 29 U.S. Code chapt. 18, <http://www4.law.cornell.edu/uscode/29/ch18.html>.

Janet L. Kaminski, “ERISA Preemption and State Health Care Reform,” Office of Legislative Research, OLR Research Report 2007-R-0131, February 9, 2007 <http://www.cga.ct.gov/2007/rpt/2007-R-0131.htm>.

National Academy for State Health Policy, “Access for the Uninsured - ERISA” (online publications) Portland, ME: NASHP, 2000-08
http://www.nashp.org/_docdisp_page.cfm?LID=7C24386B-103D-46CD-AEDC4EF6376C6E43.

State Coverage Initiatives (SCI), “ERISA Resources,” (online publications) Washington, DC: AcademyHealth, 2000-2008
<http://www.statecoverage.net/erisa.htm>.