



BRENNAN CENTER FOR JUSTICE

AT NYU SCHOOL OF LAW

MEMORANDUM

TO: Chicago City Council

FROM: Brennan Center for Justice at New York University School of Law

SUBJECT: Legal Analysis of Implications of Maryland Health Benefits Ruling for Proposed Chicago Retail Living Wage Ordinance

DATE: July 22, 2006

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QUESTION PRESENTED

This memorandum examines the implications of the recent ruling in the Maryland health benefits law case, *Retail Industry Leaders Ass'n v. Fielder*, Civ. No. JFM-06-316, 2006 WL 2007654 (D. Md. July 19, 2006), for the proposed Chicago retail living wage ordinance. Specifically, it addresses whether ERISA (the federal Employee Retirement Income Security Act), which was found to preempt the Maryland law, would pose any obstacles for the proposed living wage ordinance.

SHORT ANSWER

Contrary to the assertion made by the *Chicago Tribune* in its editorial on July 22 (“Chicago, take a look at Maryland”), Chicago’s proposed large retail living wage ordinance is not preempted by ERISA. The Maryland law was a straight health benefits mandate. The trial court found that the Maryland law was preempted by ERISA because it effectively forced covered employers to modify their health benefits offerings in order to comply with the law.

By contrast, it is well-established that combined wage and benefits laws that require employers to provide a minimum level of compensation, and give them the option of providing some of that compensation in the form of health, vacation, disability or other benefits, are not preempted by ERISA. To date, four federal appeals courts have ruled on whether ERISA preempts such laws, and all four have ruled that they are not so preempted.

The proposed Chicago ordinance follows exactly the structure of the wage laws that have been upheld by the courts: it establishes a base minimum wage for large retailers – set at \$9.25 per hour in the first year – and asks employers to provide an additional \$1.50 per hour, which can be provided in the form of supplemental wages, benefits, or any combination thereof. Whether to provide any benefits at all, and what kind of benefits to provide – paid vacation days, health or other benefits, or just supplemental wages – is left to the employer’s discretion.

This feature was key to the rulings upholding combined wage and benefits laws – and distinguishes the Chicago ordinance from the Maryland law. The fact that the Chicago ordinance follows this approach means it will similarly survive ERISA preemption.

LEGAL ANALYSIS

1. The Federal Courts Have Repeatedly Held That Combined Wage and Benefits Laws Are Not Preempted by ERISA

ERISA is a federal statute that regulates certain categories of employee benefits plans (known as “ERISA plans”) – most significantly, health benefits plans. ERISA bars states and localities from adopting laws that require employers to establish or modify ERISA plans. Significantly, however, ERISA does not regulate all employee benefits. Paid vacation, paid sick leave, severance pay, and health savings accounts are common examples of employee benefits that are generally not considered ERISA plans. *See Massachusetts v. Morash*, 490 U.S. 107 (1989); *see also Cal. Div. of Labor Standards Enf’t v. Dillingham Constr.*, 519 U.S. 316, 326-27 (1997) (distinguishing between ERISA and non-ERISA benefits). Just as importantly, wages do not constitute ERISA plans either.

The fact that wages and many types of benefits do not constitute ERISA plans explains why the federal courts have repeatedly upheld laws that establish combined wage and benefits standards. In all four recent cases where the U.S. Courts of Appeals have addressed such laws, the courts have upheld the laws under ERISA. *See Burgio v. N.Y.S. Dep’t of Labor*, 107 F.3d 1000 (2d Cir. 1997); *WSB Electric v. Curry*, 88 F.3d 788 (9th Cir. 1996); *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Department of Labor and Industry*, 47 F.3d 975 (8th

Cir. 1995); *Keystone Chapter, Ass'd Builders & Contractors Inc. v. Foley*, 37 F.3d 945 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995). The U.S. Seventh Circuit Court of Appeals, which covers Chicago, has yet to address the issue. But there is no reason to believe that it would reach a different conclusion from the other federal appellate courts.¹

These cases all involved prevailing wage laws that established combined wage and benefits standards for construction contractors performing public works projects. Employers challenged the laws as preempted by ERISA. Each of the four laws set a minimum standard for employers' hourly compensation packages. Under each of the four laws, employers could provide the whole package in wages, or could provide a portion in benefits of any sort if the employer so chose. *See, e.g., Minnesota Chapter*, 47 F.3d at 977 (“[a]n employer can divide the amount between wages and benefits as it chooses, so long as the combined total meets or exceeds the prevailing wage rate”); *id.* at 980 (“benefits and wages can be used interchangeably”); *Burgio*, 107 F.3d at 1009 (“an employer may provide supplemental benefits in any form or combination so long as the sum total is not less than locally prevailing benefits”).

An employer's “total liability would thus be the same whether the [employer] had bargained to provide benefits exclusively through ERISA plans, exclusively through non-ERISA plans, through additional cash wages, or through some combination of the three.” *Burgio*, 107 F.3d at 1009. Because of this, “The [combined wage and benefits laws] do[] not force employers to provide any particular employee benefits or plans, to alter their existing plans, or to even provide ERISA plans or employee benefits at all.” *WSB Electric*, 88 F.3d at 793.

This feature – the fact that employers can mix and match wages, non-ERISA benefits, and ERISA benefits – was crucial to the courts in finding that these laws comply with ERISA. As the Eighth Circuit explained, “[A state or local government] can set a minimum cash wage, and allow an employer the option of paying part of that in benefits, without triggering ERISA preemption.” *Minnesota Chapter*, 47 F.3d at 980 (quoting *Keystone*, 37 F.3d at 961). “Where a legal requirement may be easily satisfied through means unconnected to ERISA plans, and only relates to ERISA plans at the election of the employer, it ‘affects employee welfare benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan’” and so is not preempted. *Keystone*, 37 F.3d at 960. *Accord Burgio*, 107 F.3d at 1009; *WSB Electric*, 88 F.3d at 794.

2. The Chicago Retail Living Wage Ordinance Follows Exactly the Structure of the Combined Wage and Benefits Laws That Have Been Upheld by the Courts

The proposed Chicago retail living wage ordinance is structurally identical to the combined wage and benefits laws that have been upheld by the Second, Third, Eighth and Ninth Circuit

¹ One federal court of appeals, the Second Circuit, had held in 1989 that ERISA preempted combined wage and benefits laws. *See General Electric Co. v. N.Y. State Dep't of Labor*, 891 F.2d 25 (2d Cir. 1989). However, after that ruling, the U.S. Supreme Court issued a series of new opinions clarifying the ERISA preemption standard and New York modified its law to provide employers greater flexibility in mixing and matching wages and benefits. In light of those developments, the Second Circuit subsequently reversed itself and ruled in *Burgio v. N.Y.S. Dep't of Labor*, 107 F.3d 1000 (2d Cir. 1997), that combined wage and benefits laws are not preempted by ERISA.

Courts of Appeals. It establishes a base minimum wage for large retailers – set at \$9.25 per hour in the first year – and then asks employers to provide an additional \$1.50 per hour, which can be provided in the form of supplemental wages, benefits, or any combination thereof. Employers are allowed to mix and match wages, non-ERISA benefits, and ERISA benefits. Whether to provide any benefits at all, and what kind of benefits to provide – paid vacation days, health or other benefits, or just supplemental wages – are left to the employer’s discretion. Because the proposed ordinance mirrors the combined wage and benefits laws that have been approved under ERISA by the federal courts, one can expect that it would similarly be upheld.

The fact that the combined wage and benefits laws reviewed by the federal courts of appeals have to date been prevailing wage laws that applied to businesses performing public contracts – rather than direct regulation of private sector employers who do not receive public contracts as under the Chicago ordinance – does not matter for ERISA purposes. None of the analysis in the reported cases depended in any way on the fact that the laws regulated public contractors. *See, e.g., Council of the City of N.Y. v. Bloomberg*, 6 N.Y.3d 380, 846 N.E.2d 433 (2006) (holding that ERISA imposes the same limits on regulations that apply to government contractors as on those that regulate private employers).

3. Unlike the Combined Wage and Benefits Laws That Have Been Approved Under ERISA, the Maryland Law Was a Straight Health Benefits Mandate

Unlike the combined wage and benefits laws upheld by the federal courts of appeals, the Maryland health benefits law addressed only health benefits. It established a requirement that covered for-profit employers had to spend at least 8% of their payroll on providing health benefits (which are generally an ERISA benefit), or pay the balance in the form of a tax to the state. *Felder*, 2006 WL 2007654, at *1. The Maryland law did not allow employers the option of meeting the requirement by providing wages or non-ERISA plan benefits such as paid vacation, paid sick leave, severance pay, etc.

The court interpreted the Maryland law as “impos[ing] [an] employee health or welfare mandate[,]” and on that ground ruled that it was preempted by ERISA. *Id.* at *9-*10. In this regard, it was similar to an old federal court of appeals case that had struck down a combined wage and benefits law that had required employers to provide a specific amount of health benefits, and had not allowed employers the flexibility to mix and match wages, non-ERISA benefits and ERISA benefits. *See General Electric Co. v. N.Y. State Dep’t of Labor*, 891 F.2d 25 (2d Cir. 1989).

The defenders of the Maryland law had argued that it was not actually a mandate, since employers had the option of paying a tax to the state rather than providing the mandated benefits. However, the court held that such an option did alter the basic fact that the law was a health benefits mandate. *Felder*, 2006 WL 2007654, at *12.

Regardless of whether the *Felder* court’s ruling is correct – and there are good reasons to question aspects of it – it does not change in any way the established law regarding combined wage and benefits laws: that “[A state or local government] can set a minimum cash wage, and allow an employer the option of paying part of that in benefits,” without triggering ERISA

preemption.” *Minnesota Chapter*, 47 F.3d at 980 (quoting *Keystone*, 37 F.3d at 961). Because the proposed Chicago ordinance mirrors the wage and benefits laws that have consistently been upheld by the federal appeals courts, there is little reason to fear that it would be preempted by ERISA.