In The
United States Court of Appeals
For The Fourth Circuit

RETAIL INDUSTRY LEADERS ASSOCIATION,

Plaintiff – Appellee/Cross-Appellant,

v.

JAMES D. FIELDER, JR., in his official capacity as Maryland Secretary of Labor, Licensing, and Regulation,

Defendant – Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLEE/CROSS-APPELLANT

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INTERESTS OF THE AMICI

The Society for Human Resource Management ("SHRM") is the world's largest association of human resource professionals, currently with more than 550 affiliated chapters and members in more than 100 countries. SHRM represents more than 210,000 individual members, including many professional benefits specialists in the United States.

SHRM's mission includes ensuring that human resources is recognized as an essential partner in developing and executing employers' business and organizational strategies. Thus, SHRM's members have a professional interest in safeguarding one of the most important objectives of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"): ensuring that the adoption and design of employee benefit plans will not be subject to a patchwork of potentially conflicting regulations under state laws.

The HR Policy Association ("HR Policy") brings together the chief human resources officers of more than 250 of the largest corporations in the United States, from a diverse range of commercial, manufacturing, and natural resources companies involved in nearly every major industry sector, most of which do business in more than one state and several of which do business in all fifty states. All of HR Policy's member companies provide health care benefits to employees. HR Policy seeks to ensure that laws and policies affecting employee relations are

sound, practical, and responsive to the realities of the modern workplace, particularly in the context of multi-state administration.

The American Benefits Council ("ABC") is a broad-based, nonprofit organization founded in 1967 to protect and foster the growth of this nation's privately sponsored employee benefit plans. The Council's members include both small and large employer-sponsors of employee benefit plans, including many Fortune 500 companies. Its members also include employee benefit plan support organizations, such as actuarial and consulting firms, insurers, banks, investment firms, and other professional benefit organizations. Collectively, ABC's more than 250 members sponsor and/or help to administer plans covering more than 100 million plan participants and beneficiaries.

SHRM, HR Policy, and ABC (collectively, "*Amici*") have a profound interest in laws such as the Maryland Fair Share Health Care Fund Act ("the Fair Share Act" or "the Act"), MD. CODE ANN., LAB & EMPL., tit. 8.5, §§ 101-107 (2006). The Fair Share Act is typical of current state and local enactments and initiatives that threaten to destroy uniformity in the design and administration of medical benefit plans, to mandate the adoption of certain plan designs, and to drive up the costs of such plans, thereby exacerbating the erosion of health care coverage available to employees and their dependents. Even large employers who already provide coverage at the mandated level are concerned that, absent ERISA

preemption, such laws will be expanded in a way that poses a major threat to the ability of large employers to maintain uniform plans. After establishing a basic coverage requirement, states could then begin to micro-manage health benefit plans by imposing varying requirements governing the scope of employee and dependent eligibility, a minimum level of employer contributions, and the inclusion of certain benefits in plans.

This proposed Brief of the Society for Human Resource Management, the HR Policy Association, and the American Benefits Council as *Amici Curiae* in Support of Appellee Urging Affirmance is submitted on a motion for leave to file pursuant to Fed. R. App. Pro. 29(b).

PRELIMINARY STATEMENT

ERISA generally supersedes "any and all state laws . . . [that] relate to an employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). The scope of Section 514(a) preemption is determined by reference to the objectives of ERISA, and by taking into account the purpose and effect of the state law in issue. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-58 (1995); *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325 (1997). State and local laws are preempted if an analysis of their effects shows that they would conflict

with a basic federal objective embodied in ERISA. *Ingersoll-Rand Co. v. McLendon*, 498 U.S. 133, 142 (1990).

Section 514(a) itself embodies one of the central purposes of ERISA: to establish that the regulation of employee benefit plans covered by ERISA will be exclusively federal. *New York State Conference of Blue Cross & Blue Shield Plans*, *supra*, 514 U.S. at 657. The "basic thrust [of Section 514(a)] was to avoid a multiplicity of regulation in order to permit nationally uniform administration of employee benefit plans." *Id.*

The Fair Share Act is an example of the very phenomenon Congress sought to avoid through preemption. Under the Act, a covered for-profit employer must pay annually the amount by which its "health insurance costs" fall short of 8% of its "total wages paid to employees in the state." MD. CODE ANN., LAB & EMPL., tit. 8.5, § 104(B) (2006). The Act makes "nationally uniform administration" of a covered employer's medical plan impossible unless the employer designs its plan for employees in every state based on Maryland's mandate.

Standing alone, the Fair Share Act is burdensome enough. As the district court recognized, however, the Fair Share Act's requirements also would conflict with current and pending requirements in other jurisdictions. *Retail Industry Leaders Ass'n v. Fielder*, 435 F. Supp. 2d 481, 495 & n.13 (D. Md. 2006). Indeed,

if every state enacted its own unique mandate, employers would be pressured to structure and to segregate their health care plans state-by-state. *Id.* at 495.

The burden the Act represents for employers becomes clearer in light of the state and local mandates proposed or adopted in the wake of the Fair Share Act. Legislation modeled after the Fair Share Act has been introduced in nearly 30 states. Michael T. Burr, *Fair-Share Showdown: State Lawmakers Target Employers in Effort to Expand Health Insurance Coverage*, INSIDE COUNS., May 30, 2006 *available at* http://www.insidecounsel.com/issues/insidecounsel /15_199/regulatory/487-1.html. In some instances, these measures are exact replicas of the Act. However, in other instances, the thresholds relating to a number of employees and the required percentage of taxable payroll that must be dedicated to health benefits vary.[1] While some of these bills were unsuccessful, many lawmakers have indicated that they will pursue them in future legislative sessions. *Id.*

[1] A New Jersey bill introduced this year would have required all employers with more than 1000 employees in the state to pay at least $4.17 per hour on health care expenditures or pay the difference to the state. A.B 2891, 212th Leg. (N.J. 2006). A bill introduced in the New York Assembly would subject employers with more than 100 workers in the state to spend $3 per hour per employee on health benefits or pay the difference to the state. S. 7090, State Assem. (N.Y. 2006). An Oklahoma bill would require employers of 3000 or more to spend at least 9 percent of payroll on health care and if not, to pay the difference between what was spent and 9 percent into a state fund. H.B. 2678, 50th Leg., 2d Sess. (Okla. 2006).

A glimpse at the provisions of a Vermont law enacted in the wake of the Fair Share Act illustrates the problems that could be faced by employers that want to maintain and administer uniform benefit plans. *See* H. 861, 2005-2006 Leg., Sess. (Vt. 2006). Chapter 25 of the Health Care Affordability for Vermonters Act adopted in May 2006 authorizes and requires an assessment on any Vermont employer under specified conditions determined in part by the employer's policy for contributing to its employees' health care coverage cost, and in part by whether the employer makes every health plan offered to any employee universally available to all employees. *See* 34.21 VT. STAT. ANN., ch. 25, § 2002(4)(A) (defining "uncovered employee" to include every employee of an employer if the employer does not offer to pay at least part of the cost of each of its employee's cost of health care coverage), 34.21 VT. STAT. ANN., ch. 25, § 2002(4)(B) (defining "uncovered employee" to include any employee who is not eligible for coverage under a plan offered by his or her employer to any of its other employees, and 34.21 VT. STAT. ANN., ch. 25, § 2003(a) (imposing a quarterly assessment based on the number of full-time equivalent uncovered employees in excess of 8 during 2007-08, in excess of 6 during 2009, and in excess of 4 thereafter).

Furthermore, if the Fair Share Act is upheld, the assault on ERISA's fundamental goals will have only just begun. The arguments advanced in support of the Act would just as easily justify state and local "payroll taxes" featuring

dollar-for-dollar credits based on medical benefits provided to "part time employees" (defined one way in one jurisdiction and another way elsewhere), retirement plan matching contributions to the extent they exceed a stated percentage of employee elective deferrals (perhaps 6% in one state and 7% in every contiguous state), or any of a host of other benefits-related "agenda items" that strike the fancy of this or that state legislature, county council, or board of aldermen.

An employer's ability to maintain a nationally uniform plan is crucial to ERISA's goals, particularly for large employers operating in numerous states. Uniformity promotes efficiencies that hold down costs. It allows employers to obtain better pricing by negotiating contracts with national or regional vendors based on a standard model. Uniformity also serves the commonly held principle that all similarly situated workers within one company should be entitled to similar benefits regardless of the state in which they reside.

The Fair Share Act effectively trumps Congress's decision that employee benefit plans would be governed by a single, nationally-uniform body of law and regulation, but it represents more than a blow against employers' ability to maintain nationally uniform medical plans. The Act represents an assault on the very foundations of the federal statute.

ERISA is premised on the voluntary adoption of employee benefit plans and an employer's statutory right to design its employee benefit plans. To encourage employers to adopt such plans, ERISA's preemption provision was designed to free employers from the expense and administrative burdens of complying with state regulation, thereby permitting uniformity in plan design and administration in the multistate context. Along with other state and local initiatives of the same ilk, the Act would replace employer autonomy and the regulatory uniformity desired by Congress with a hodge-podge of mutually inconsistent state and local mandates. The Act subverts the principal basis underlying ERISA's express preemption provision—uniformity in plan design—and for the very same reason represents a classic case of conflict preemption. Thus, the Act is preempted under ERISA § 514(a) and under the Supremacy Clause.

ARGUMENT

I. PREEMPTING STATE LAWS THAT THREATEN REGULATORY UNIFORMITY IN PLAN DESIGN AND ADMINISTRATION IS THE CORNERSTONE OF ERISA.

ERISA guarantees employers that their benefit plans will be subject only to a uniform body of law, *i.e.*, federal law. Congress knew that this guarantee was absolutely essential to the statute's purposes. ERISA is premised on the voluntary adoption of employee benefit plans and employer autonomy in plan design. The

Fair Share Act and similar state and local measures would subvert these principles, making uniform plan design in the multi-state context impossible.

A. Congress Was Aware of the Advantages of Uniformity in Plan Design and Administration, Which is Essential to Cost Control and Efficiencies That Allow Employers to Provide Greater Benefits.

Employers' ability to design uniform medical plans covering employees in numerous states is crucial to ERISA's goals. A single state or local mandate can disrupt this uniformity, resulting in additional administrative costs that simply add to the growing burden of providing health care benefits. *Cf. Retail Industry Leaders Ass'n, supra*, 435 F. Supp. 2d at 494-95 (noting that the Act creates health care spending requirements not applicable in most other states). A plethora of different state and local mandates can deprive employers and employees of all the advantages of a uniform nationwide plan. *Id.*, 435 F. Supp. 2d at 494 n.13. Mutually inconsistent state and local mandates could make it impossible for an employer lawfully to provide any medical benefits at all under a single, nation-wide plan. *Cf. id.*, 435 F. Supp. 2d at 494 & n.13 (noting direct conflict between the Act and enactments in two other states and the potential for a limitless number of local mandates).

These facts are not new. Congress knew when ERISA was adopted that the employer's statutory right to control the design of its welfare benefit plans would be meaningless if ERISA-governed plans were subject to state and local

requirements. Frank Cummings, the chief legislative assistant to ERISA's primary Senate sponsor, Sen. Javits, put it bluntly in his Congressional testimony: "Obviously, if the States are to legislate in this field . . . only chaos can result." *See* J.A. Wooten, A Legislative and Political History of ERISA, Part I, 14 Jo. of Pension Benefits 31 (2006), citing and quoting Senate Committee on Finance, *Private Pension Plan Reform: Hearings before the Committee on Finance*, 93d Cong., 1st sess., 1973, 1031.

Congress perceived that unless ERISA preempted state law in the field of employee benefit plans, the door would be open to "multiple and potentially conflicting State laws contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme." 120 CONG. REC. 29,942 (1974). ERISA's proponents noted that preemption would "round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation . . ." *Id.* at 29, 197.

Since ERISA is premised on voluntary adoption of employee benefit plans,[2] Congress also knew that a statutory guarantee of regulatory uniformity was essential to encouraging employers to adopt and maintain welfare benefit plans,

[2] *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 384-85 & n.35 (1980). *See also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); and *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

because Congress knew that uniformity reduces the cost and administrative burdens associated with employer-sponsored benefit plans. Thus, in the words of the lead sponsor of ERISA in the House of Representatives, ERISA's explicit preemption provision was "the crowning achievement of this legislation . . ." 120 CONG. REC. 29, 197 (1974). Section 514(a) guarantees plan sponsors that state and local laws mandating plan adoption and or impinging on plan design will be preempted. Congress intended Section 514(a) to be construed broadly to eliminate threats to employer autonomy and regulatory uniformity. *See* 120 Cong. Rec. 29, 933 (1974).

B. ERISA Provides for Employer Autonomy Over Plan Design.

"Nothing in ERISA . . . mandate[s] what kind of benefit employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). The premise of ERISA is incompatible with government-mandated benefits. ERISA affirmatively commits plan design decisions to employers. *See, e.g.*, E.A. Zelinsky, *Travelers*, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption, 21 Cardozo L. Rev. 807, 812 (1999) (footnotes omitted). *See also Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."). As Professor Edward Zelinsky, a recognized authority on ERISA, has put it, "Section

514 and the structure of ERISA [create] a zone of employer autonomy in the design and operation of employers' welfare plans." E.A Zelinsky, Maryland's "Wal-Mart" Act: Policy and Preemption, __ Cardozo L.Rev. (forthcoming), available at http://papers.ssrn.com /abstract=926740 ("Maryland's 'Wal-Mart' Act"), 45. *See also id.*, 8 ("under any of the plausible approaches to Section 514, that section preempts the Maryland Act.")

The statutory text of ERISA explicitly commits plan design decisions to employers as the sponsors of employee benefit plans. ERISA defines the term "employee welfare benefit plan" to include any "plan, fund, or program . . . *established or maintained by an employer*" that provides specified types of benefits. ERISA § 3(1), 29 U.S.C. § 1002(1) (emphasis added). Section 402(a)(1) of ERISA provides that "Every employee benefit plan shall be *established and maintained* pursuant to a written instrument." *See* 29 U.S.C. § 1102(a)(1) (emphasis added).[3] The written instrument determines how the plan is administered and funded, including who is eligible for coverage and what benefits are available under the plan. *See* ERISA § 402(b)(4), 29 U.S.C. § 1102(b)(4) and § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (requiring a plan fiduciary to discharge his duties with respect to a plan "in accordance with the documents and

[3] An "instrument" has been defined as "A document or writing which gives formal expression to a legal act or agreement, for the purpose of creating, securing, modifying, or terminating a right." Black's Law Dictionary, 801 (6th ed. 1991).

instruments governing the plan" to the extent not inconsistent with ERISA). Thus, one and the same act on the part of the employer causes an employee benefit plan to be "established or maintained" and defines its terms.[4] *Cf.* Zelinsky, Maryland's "Wal-Mart" Act, *supra*, at 41 ("[the Fair Share Act] intrudes upon employers' autonomy as to medical plan participation and funding, topics ERISA reserves for employer discretion.").

In the opinion of one of ERISA's primary architects among the Congressional staff, ERISA would not have been adopted if it had not been premised on preserving employer autonomy over plan adoption and plan design. *See* Michael S. Gordon, *Introduction: The Social Policy Origins of ERISA*, in S.J. Sacher and J.I. Singer, eds., *Employee Benefits Law* (ABA, 2d ed. 2000) at xc–cii. The leading historian of ERISA's enactment has reached the same conclusion, saying that "The desire for federal preemption was a key factor – perhaps, the key factor – in creating the coalition that pushed ERISA through Congress." J.A. Wooten, A Legislative and Political History of ERISA, Part I, 14 Jo. of Pension Benefits 31 (2006). Moreover, Congress has reaffirmed its commitment to the bedrock premise of employer autonomy as ERISA has been amended over the

[4] This Court has recognized that one of an employer's plan design rights, the right to amend a welfare benefit plan, is a statutory right under ERISA. *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855 (4th Cir. 1994); *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 295 (4th Cir. 1993).

years. *See* 29 U.S.C. § 1001a(c)(2), as added by § 3 of the Multiemployer Pension Plan Amendments Act of 1980, and 29 U.S.C. § 1001b(c)(2), as added by Title XI, § 11002 of the Single Employer Pension Plan Amendments Act of 1986.

C. Preserving Employers' Ability to Design Benefit Plans in Light of a Uniform Body of Exclusively Federal Regulation is Essential to Fulfilling ERISA's Purposes.

There is a direct link between promoting the voluntary adoption of employee benefit plans and allowing employers to design their plans to comply with a uniform body of regulation under federal law rather than a hodge-podge of different and perhaps contradictory state and local laws. The link is that compliance with potentially hundreds of state and local mandates would drive up the expense and administrative burdens associated with operating a plan, thereby deterring employers from maintaining employee benefit plans.

It is widely recognized that an employer's ability to design its plans against a backdrop of a single, uniform body of law and regulation is necessary to control costs and therefore to encourage employers to adopt and maintain employee benefit plans. *See, e.g.*, D.T. Bogan, ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies, 42 Santa Clara L. Rev. 105, 118 n. 51 (2001) ("An ancillary intent [of ERISA] was to make the world of pension regulation uniform, in order to encourage employers to continue to provide such benefits. Congress provided uniform regulation of the pension

industry for fear that if the industry was over-regulated, it might work to hurt consumers by causing employers to abandon the benefit."). The Supreme Court has recognized the linkage between the principle of employer autonomy, the goal of encouraging the adoption of employee benefit plans, and the expense of maintaining a plan. *See Inter-Modal Rail Employees Ass'n. v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (reasoning that Congress specifically provided employers the freedom to amend or terminate welfare benefit plans in order to encourage the voluntary adoption of such plans, since Congress knew that the inability to amend such plans in light of unforeseen events might deter employers from adopting such plans).

II. THE FAIR SHARE ACT IS PREEMPTED BECAUSE IT MANDATES ADOPTION OF A MEDICAL BENEFIT PLAN.

State laws that impose employee health or welfare mandates on employers are preempted by ERISA. *See, e.g., District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992). The Fair Share Act is just such a law, notwithstanding Appellant's arguments to the contrary.

It is clear from the Act's definition of "health insurance costs" that the only expenditures for employee health care that are certain to satisfy the Act's requirements are expenditures incurred under ERISA-governed welfare benefit plans. MD. CODE ANN., LAB & EMPL., tit. 8.5, § 101(d)(1) (2006). Nonetheless, Appellant suggests that a covered employer can incur sufficient health insurance

costs to avoid payments under the Fair Share Act without maintaining a plan covered by ERISA in one of two ways: (a) by spending 8% of its Maryland payroll solely on medical care dispensed at on-premises facilities for the treatment of minor illnesses or injuries and first aid in the case of accidental injuries during working hours; and (b) contributing 8% of its Maryland payroll to "health savings accounts" maintained by its employees under Code § 223. *See* App. Br., 56, citing 29 C.F.R. § 2510.3-1(c)(2) (2004) and Employees Benefits Security Admin., U.S. Dep't of Labor Field Assistance Bulletin 2004-1 (April 17, 2004) ("FAB 2004-1"); *see also* I.R.C. § 223. Both suggestions are wrong.

Establishing a first aid station program that can spend 8% of payroll solely to treat minor injuries and illness and/or to provide first aid for accidents during working hours is simply not a practical alternative, as the District Court recognized. *Retail Industry Leaders Ass'n, supra*, 435 F. Supp. 2d at 497. Furthermore, the exemption for on-premises first aid stations in 29 C.F.R. § 2510.3-1(c)(2) was never intended to apply to a program that spends 8% of wages on first aid and medical care for minor illnesses and injuries. Applying Section 2510.3-1(c)(2) as Appellant suggests would be contrary to the intent of the regulation, which was promulgated to relieve employers of the regulatory burdens of Title I compliance, *not* to strip employers of the protection of ERISA preemption.

The inapplicability of Section 2510.3-1(c) is evident from its history. The current Section 2510.3-1(c) was a consolidation of two provisions in the proposed Part 2510 regulations, one of which exempted from the definition of "employee benefit plan" an employer's maintenance of "on-premises service facilities . . . [for] recreation, dining, or other facilities (other than . . . facilities providing benefits described in Section 3(1) of the Act [*i.e*, ERISA]," and the other for maintaining a "first aid station." Office of Employee Benefits Security, U.S. Dep't of Labor, Notice of Final Rule, 40 Fed. Reg. 34533 (August 15, 1975); *cf*. Prop. Reg. § 2510.3-3(e) and (i) in Office of Employee Benefits Security, U.S. Dep't of Labor, Notice of Proposed Rulemaking, 40 Fed. Reg. 24642, 24652-53 (June 9, 1975). The Department of Labor specifically found that "first aid stations . . . arguably might fall within the scope of Section 3(1)." Notice of Proposed Rulemaking, *supra*, 40 Fed. Reg. at 24642.

The basis for administratively excluding on-site first aid facilities from the regulatory definition of "welfare benefit plan" was the Department of Labor's conclusion that such facilities confer only "incidental benefits" on employees, *i.e.*, that the employer maintains such facilities to promote its interest in allowing employees to report for or remain at work or its interest in minimizing the harm from on-the-job sickness and accidents. Thus, the Department of Labor concluded that "the protection which would be afforded to employees if such facilities were

treated as employee benefit plans would not justify the costs of Title I compliance." Notice of Proposed Rulemaking, *supra*, 40 Fed. Reg. at 24642.

Amici submit that maintaining first aid stations to spend 8% of payroll does not fall within the purported exemption from ERISA coverage under Section 2510.1-3(c)(2) because, by definition, an increase in spending on such facilities mandated by state law does not reflect the employer's perception of its interest in maintaining productivity or loss avoidance. Furthermore, when 8% of payroll is at stake, the Department of Labor is unlikely to conclude that employees do not need the protections of Title I compliance.

Appellant is wrong to interpret FAB 2004-1 to mean that an employer can satisfy the spending requirements of the Fair Share Act by contributing to health savings accounts ("HSAs") maintained by employees. In order for an employee to be eligible to establish an HSA, the employee must be covered by a "high deductible health plan" as defined in Section 223(c)(2). *See* I.R.C. § 223(a) and (c)(1)(A)(i). Because Section 223 contemplates that employers will establish high deductible group health plans for employees, the only issue addressed in FAB 2004-1 is "Whether Health Savings Accounts *established in connection with employment-based group health plans* constitute 'employee welfare benefit plans' for purposes of Title I of ERISA?" *Id.* (emphasis added). The employer-provided high-deductible health plan coverage that is a prerequisite to establishing the only

HSAs described in FAB 2004-1 is an employee welfare benefit plan covered by ERISA. *Id.* Thus, the HSA contributions described in FAB 2004-1 require an employer first to establish a high-deductible health plan, which is a plan governed by ERISA. *Id.*[5]

Appellant's reliance on FAB 2004-1 is misplaced for an additional reason. When an employer contributes to its employees' individual medical expense coverage arrangements under circumstances where the factors in *Donovan v. Dillingham* are satisfied, the program of employer contributions itself constitutes an ERISA-governed plan for purposes of preemption, *even if the medical coverage obtained by an employee consists of an individual policy that would not itself constitute an ERISA-governed plan*. *See Madonia v. Blue Cross/Blue Shield of Virginia*, 11 F.3d 444, 446-47 (4th Cir. 1993), *citing Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982).

One of Appellant's *amici* argues that a covered employer can achieve the mandated "health insurance cost" expenditure percentage without establishing an ERISA-governed plan by reimbursing employees at random for medical care expenses. *See* Brief for Medicaid Matters Maryland as Amicus Curiae Supporting

[5] In Field Assistance Bulletin 2006-2 (October 27, 2006), the Department of Labor provided guidance on "a number of recurring questions about [FAB 2004-1] and the evolving practices regarding offering HSAs." Nothing in FAB 2006-2 purports to expand the Department's conclusions regarding exemption from ERISA coverage in FAB 2004-1

Appellant at 15, *Retail Industry Leaders Ass'n v. Fielder*, No. 06-1840, 06-1901 (4th Cir. Oct. 6, 2006). Appellant makes no such argument. Brief of Appellant, *Retail Industry Leaders Ass'n v. Fielder*, No. 06-1840, 06-1901 (4th Cir. Sept. 27, 2006). Perhaps this is because Appellant recognizes that the fantasy scenario posited by its *amicus* would result in potentially devastating financial consequences for the recipients of such *ad hoc* reimbursements by subjecting them to income tax on the reimbursements, which represent non-cash remuneration includible in gross income.[6]

In any event, the scenario posited by Medicare Matters!Maryland is a welfare plan as defined by ERISA because it satisfies the four-factor test of *Donovan v. Dillingham*, *supra.* The procedure for receiving benefits is simply to be an employee who is selected for reimbursement of medical expenses incurred, and the Act itself determines the remaining three *Donovan v. Dillingham* factors. The intended benefits are reimbursement for health care. MD. CODE ANN., LAB & EMPL., 8.5-101(D)(1). The beneficiaries must be Maryland employees of the

[6]An amount paid by an employer to reimburse an employee for medical care expenses is includible in gross income unless the reimbursement is provided through insurance or "an accident or health plan for employees." Code § 105(a), (b) and (e)(1). There is a "plan" for purposes of Section 105 only if the reimbursement arrangement is in writing and enforceable by the covered employee, or at least communicated to the covered employee in advance of the onset of the illness. Treas. Reg. § 1.105-5(a). It follows that providing reimbursement for medical care at random would subject employees to income tax on non-cash remuneration.

covered employer. MD. CODE ANN., LAB & EMPL., 8.5-104. The source of funds must be the covered employer's assets. MD. CODE ANN., LAB & EMPL., 8.5-101(D)(1) and 8.5-104.

III. THE FAIR SHARE ACT IS PREEMPTED BECAUSE IT DICTATES THE DESIGN OF A COVERED EMPLOYER'S MEDICAL BENEFIT PLAN.

A covered employer's obligation under the Fair Share Act is determined by the ratio of "health insurance costs" to "wages" paid to employees in Maryland. Since the minimum ratio necessary to avoid an obligation under the Act cannot be achieved through expenditures outside an ERISA-covered plan, the Fair Share Act dictates not only the existence of such a plan, but also its design. To avoid the statutorily required payment, the covered employer's plan must be designed so that expenditures under the plan plus any "health insurance costs" provided outside an ERISA-covered plan must add up to at least 8% of the employer's "total wages" paid to employees in Maryland.

Because the Act mandates the design of a covered employer's medical benefit plan, it has "reference to" an employee benefit plan for purposes of ERISA § 514(a), and is therefore preempted. A state statute has a "reference to" ERISA where it "acts immediately and exclusively upon ERISA plans" or "where the existence of ERISA plans is essential to the law's operation." *Dillingham Construction, N.A., Inc., supra,* 519 U.S. at 324-25 (1997); s*ee, e.g., Greater*

Washington Bd. of Trade, 506 U.S. at 130 (statute explicitly referring to plans governed by ERISA preempted). As the Court has explained, "[u]nder the [reference to] inquiry, we have held pre-empted a law that impos[ed] requirements by reference to [ERISA] covered programs." *Id.* at 130-31; *see also Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 828, n. 2 (1988) (holding that a law specifically exempting ERISA plans from an otherwise generally applicable garnishment provision was preempted); *Ingersoll-Rand Co. v. McClendon*, *supra*, 498 U.S. at 140 (holding that a common-law cause of action premised on the existence of an ERISA plan was preempted).

IV. THE FAIR SHARE ACT IS AN OBSTACLE TO ACCOMPLISHING THE PURPOSES OF ERISA AND IS THEREFORE PREEMPTED UNDER THE SUPREMACY CLAUSE.

Under the Supreme Court's Supremacy Clause jurisprudence, a state law is preempted "where compliance with both federal and state regulations is a physical impossibility. . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 98 (1992) (describing "conflicts preemption" doctrine). The conflicts preemption doctrine is fully applicable to ERISA where a state law conflicts with or operates to frustrate the objectives of provisions other than Section 514(a). *See Boggs v. Boggs*, 520 U.S. 833, 841 (1997).

"A state law may pose an obstacle to federal purposes by interfering with the accomplishment of Congress's actual objectives, or by interfering with the *methods* that Congress selected for meeting those legislative goals." *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 596 (4th Cir. 2005), citing *Gade*, *supra*, 505 U.S. at 103. A state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress where the state law significantly impairs the exercise of a federally secured right. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709-11 (1984) (Oklahoma statute that required cable broadcaster to delete wine commercials from pay channels preempted under "conflict preemption" analysis because compliance with the Oklahoma law would result in broadcaster's inability to comply with a condition for availing itself of the benefits of compulsory licensing conferred by the Copyright Revision Act of 1976).

The Fair Share Act is not only an obstacle to attaining regulatory uniformity of covered plans nationwide. The Act also interferes with and significantly impairs a covered employer's statutory right under ERISA to design its employee benefit plans as it sees fit, subject only to the constraints of a single body of law. The Act imposes financial burdens on employers based solely on their choice of one plan design permissible under federal law versus another. Thus, the Act is preempted under the "conflict preemption" doctrine.

A. A Covered Employer's Obligations Under the Fair Share Act Increase in Proportion to "Wages" it Pays to Maryland Employees.

A covered employer's obligation under the Fair Share Act is determined by the ratio of its "health insurance costs" to "total wages paid to employees in the state." MD. CODE ANN., LAB & EMPL., tit. 8.5, § 104(B) (2006). With minor exceptions, "wages" under the Act means the total of wages and benefits paid or provided to the employee by the employer that are subject to federal withholding. *See* MD. CODE ANN., TAX, tit. 10, § 905(b); MD. CODE ANN., LAB & EMPL., tit. 8.5, § 104(B) (2006); MD. CODE ANN., TAX, tit. 10, § 905(f)(1)-(2); and I.R.C. § 3401(a). Since a covered employer's obligation under the Fair Share Act is determined by the ratio of "health insurance costs" to Maryland "wages," plan design decisions that result in an increase in benefits subject to withholding result in a corresponding 8% increase in spending required by the Act. As discussed below, because the Act attaches different consequences to some plan design decisions permitted by ERISA but not others, it impermissibly impinges on a covered employer's decisions regarding even non-medical benefit plans.[7]

[7] There is no requirement that Section 514(a) preemption or conflicts preemption issues raised by the Fair Share Act be judged solely based on the Act's effect on a covered employer's medical benefit plan. An employer's medical plan cannot be viewed in isolation from its compensation and benefits policies as a whole, because remuneration for employment includes cash compensation payable as services are performed, welfare and other fringe benefits, and deferred compensation such as benefits from a pension or profit-sharing plan. *See, e.g., G. T. Milkovich and J. M.*

B. As a Result of Defining a Covered Employer's "Pay or Play" Obligation Differently When the Employer Exercises Its Right Under ERISA to Choose Certain Benefit Plan Designs Over Others, the Fair Share Act Impermissibly Burdens the Exercise of a Federally Established Right.

The Fair Share Act's interference with a covered employer's right under ERISA to choose from among a variety of permissible plan designs can be illustrated with the example of a plan that pays an employee his or her regular wages when the employee is unable to work because of sickness or accident (such as a short-term disability plan). A funded short-term disability plan is a welfare benefit plan governed by ERISA. *See* ERISA § 3(1); *cf.* Treas. Reg. § 1.106-1, cross-referencing former Code § 105(e) (1956). Many employers chose to fund disability benefit plans through after-tax payroll deductions so that disability benefit payments will be excluded from a disabled employee's gross income. *See, e.g.*, District of Columbia Office of Personnel, Benefits Summary, http://www.dcop.dcgov.org/services/employee_bene/benefits_after87.shtm

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Newman, Compensation (7th ed. 2002) 7-8, 425; *D. M. McGill, et al., Fundamentals of Private Pensions* (7th ed. 1996) 338. To permit employers to provide employees with the "mix" of wages and benefits they prefer, ERISA's policy of employer autonomy in benefit plan design must extend to all ERISA-governed plans, not merely to medical benefit plans.

"Deductions for short-term disability insurance are done on an after-tax basis. This assures that the payments you receive from the program are not taxed.").[8]

The Fair Share Act imposes a burden on an employer that chooses to maintain an ERISA-governed disability plan funded by after-tax employee contributions. In order to continue to fund disability benefits on a tax-favored basis to employees, the employer must include the employees' after-tax contributions in the denominator of the fraction that triggers and determines the Fair Share Act payments. The resulting increase in the denominator of the fraction requires the covered employer to do one of two things: either to provide additional employer-paid health coverage to achieve or maintain its 8 percent health insurance expense-to-Maryland-wages ratio, or to make a statutorily required payment based on its failure to do so.

Thus, the Act imposes different consequences on a covered employer based solely on which of two plan-related choices the employer makes, even though each choice is permitted under ERISA and even though ERISA explicitly commits the design choice to the employer's discretion. Where federal law provides that a party has a choice between two alternatives, a state law is preempted as being an

[8]Disability benefits received from an employer-sponsored plan are not includible in the employee's gross income except to the extent the plan's benefits are provided through employer contributions or through employee contributions that were not included in the participants' gross income. I.R.C. § 105(a); Treas. Reg. 1.105-1(c)(3).

obstacle to the federal law if the state law penalizes the party's choice of one of those alternatives. *Lividas v. Bradshaw*, 512 U.S. 107, 117 (1994) (state labor commissioner's policy of not enforcing the state's wage payment act in cases involving collectively bargained employees where contract provided for arbitration held preempted by the National Labor Relations Act).

Furthermore, a state law is preempted if it "burdens the exercise of [a] federal right" established by a federal statute and "[t]he burden . . . is inconsistent in both design and effect with the . . . aims" of the federal statute. *Felder v. Casey*, 487 U.S. 131, 141 (1988). *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 385-86 (3d Cir. 1999), illustrates an application of this principle involving the effect of a state law on a copyright holder's licensing rights under the Copyright Act that is indistinguishable from the effect of the Fair Share Act on an employer's plan design rights under ERISA.

In *Orson, Inc.*, a Pennsylvania statute prohibited exclusive licenses of more than 42 days with respect to first-run movies unless the license provided for distribution to specified second-run theaters and unless prints of the movie actually were made available to such second-run theaters. Pennsylvania Feature Motion Picture Fair Business Practices Act, 73 Pa. Cons. Stat. § 203-7. The statute evidently was construed to create a private right of action. *Orson, supra*, 189 F.3d at 380. The Third Circuit, sitting *en banc*, held that the statute was preempted

because it conflicted with Section 106 of the Copyright Act, 29 U.S.C. § 106, which creates a right in the copyright holder to distribute copies of the copyrighted work. The Third Circuit's rationale is equally applicable to the Fair Share Act:

> . . . [S]ection [203-7] cannot stand because it prohibits the copyright holder from exercising rights protected by the Copyright Act. Among the "exclusive rights" granted under § 106 in the Copyright Act are the rights to "distribute" and to "perform the copyrighted work publicly." However, section 203-7 requires the distributor to expand its distribution after forty-two days by licensing another exhibitor in the same geographic area, even if such expansion is involuntary and uneconomic. . . . A distributor who exercises its federal right to grant an exclusive license to an exhibitor of choice will be subject to liability under the Pennsylvania Act for refusing to grant licenses to other exhibitors in the same geographic area after the forty-second day. The potential for liability under the state law for the copyright holder's exercise of its federal rights became a reality in this case and illustrates the conflict created by the Pennsylvania Act.

Id., 189 F.3d at 385.[9]

[9] The same conclusion would result under Section 514(a). The Supreme Court has held that a state law that binds the administrator of an ERISA-governed plan to one of several permissible plan provisions is preempted by Section 514(a) because it has an impermissible "connection with" ERISA plans. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001). In so holding, the Court distinguished the statute at issue in *Egelhoff* from generally applicable state laws regulating matters as to which ERISA is silent and having only an incidental effect on ERISA-governed plans. *Id.*, 532 U.S. at 147-48. Unlike such laws, the Court held, the statute in *Egelhoff* ran counter to ERISA's command that a plan document must "specify the basis on which payments are made to and from the plan." *Id.*, citing ERISA § 402(b)(4), 29 U.S.C. § 1102(b)(4).

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

But for the distinction between payments to and payments from a plan, the Fair Share Act is indistinguishable in this regard from the statute at issue in *Egelhoff*. Just as ERISA permits a plan to select from among various rules for determining beneficiary status, ERISA permits plan benefits to be financed in one of three basic ways: by employer contributions, by employee pre-tax contributions, or by employee after-tax contributions. Just as the statute in issue in *Egelhoff* bound plans to a particular rule for determining beneficiary status, the Fair Share Act determines which of ERISA's three basic financing methods an employer must choose.

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CERTIFICATE OF COMPLIANCE

This Brief of Amicus has been prepared using:

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I hereby certify that on this 7th day of November 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery, the required number of copies of this Brief of Amicus, and further certify that I served, via First Class U.S. Mail, the required number of said Brief to the following:

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