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## SAN FRANCISCO'S HEALTH CARE ORDINANCE IS NOT PREEMPTED BY ERISA

The Ninth Circuit Court of Appeals has ruled that ERISA does not preempt San Francisco's newly enacted Health Care Security Ordinance. *Golden Gate Rest. Ass'n v. City of San Francisco*, 2008 U.S. App. LEXIS 20574 (9th Cir. Sept. 30, 2008). The ordinance mandates that covered employers make minimum health care expenditures (ranging from \$1.17 – \$1.76 per hour worked) to or on behalf of certain employees.

Covered employers include for-profit employers with 20 or more employees and non-profit employers with 50 or more employees. With a few limited exceptions (e.g., salaried managers earning approximately \$80,000 per year), covered employees include individuals who work in San Francisco, work at least 10 hours per week, and have worked for the employer at least 90 calendar days.

The court's opinion addressed whether ERISA preempted the ordinance because it either (1) creates a "plan" within the meaning of ERISA, or (2) "relates to" ERISA benefit plans. These issues were decisive because ERISA governs "employee benefit plans" and preempts "any and all State laws insofar as they...relate to any employee benefit plan [governed by ERISA]."

Ultimately, the court found that the employer's obligation to make health care payments based on an employee's hours did not establish or "relate to" ERISA plans. According to the court, to constitute an ERISA plan, the employer's administrative duties must involve significantly more ongoing, administrative discretion (providing the potential for abuses and other mismanagement of funds) than those the ordinance imposed. The court also noted that where the employer makes the payments directly to its employees, little differentiates these expenditures from employee wages. Consequently, these expenditures do not constitute an ERISA plan.

Interestingly, the court's decision appears somewhat inconsistent with *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), in which the Fourth Circuit Court of Appeals held that ERISA preempted a similar Maryland statute. That statute required Maryland employers with 10,000 or more employees to spend at least 8 percent of their payrolls on employee health care expenditures or pay any spending shortfalls directly to the state. The Ninth Circuit differentiated the *Fielder* opinion by pointing out that the Maryland statute only applied to one company, Wal-Mart, and the statute essentially forced Wal-Mart to completely alter its health care plan or pay a fine to Maryland.

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