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Golden Gate ERISA Case Ripe For High Court: Attys

By **Ben James**

Law360, New York (October 05, 2009) -- The U.S. Supreme Court on Monday invited the solicitor general to weigh in on the Golden Gate Restaurant Association's challenge to a San Francisco ordinance requiring employers to spend specific amounts on employees' health care, in a case lawyers say is an important preemption dispute the high court will likely take up.

Trade group GGRA filed its petition for certiorari in June. In September 2008, the U.S. Court of Appeals for the Ninth Circuit reversed a lower court and rejected the GGRA's argument that the Employee Retirement Income Security Act of 1974 precluded San Francisco from implementing the ordinance.

The fact that the Supreme Court asked the Solicitor General for input on whether or not to take the case--rather than denying certiorari outright--is a positive sign for the GGRA, said Ethan Lipsig, a Paul Hastings Janofsky & Walker LLP partner based in San Francisco.

The solicitor general may say that the Supreme Court should grant certiorari so it can address the conflict between the circuits, according to Lipsig.

"If I had to wager, this is the position I would expect the solicitor to take," Lipsig said. That stance would also allow the solicitor to avoid having to rely on the assertion that the U.S. Department of Labor, which previously filed amicus brief with the Ninth Circuit arguing in favor of preemption, was wrong, Lipsig added.

The case should interest every employer in the United States, said David L. Bacon, a Nixon Peabody LLP partner who represents the GGRA.

Though San Francisco's Health Care Security Ordinance would only apply to companies with 20 or more employees, smaller outfits have an interest in the case's outcome if they have

hopes of expanding or being acquired, Bacon said.

The HCSO sets minimum health care expenditures for employers, which businesses can satisfy by providing their workers health care coverage, or by paying into a fund for a public program for the city's uninsured residents.

Letting San Francisco craft its own health insurance mandate for employers would give other cities and states a free hand to experiment with similar rules, and lead to a complicated patchwork of legal requirements that would undermine ERISA's goal of helping large employers create nationwide benefits plans, according to Bacon.

Leaving the Ninth Circuit's decision intact would not just mean a compliance headache for businesses, but a blow to employees' bottom lines as well, he said, because the burden of higher costs for employers would ultimately fall on workers' backs.

"There's no better way to foul up the economy than to do what San Francisco is doing, and San Francisco is too provincial to realize it," Bacon said.

The preemptive scope of ERISA allows employers to enjoy economies of scale in setting up and administering nationally uniform employee benefit plans, but if those economies of scale are disrupted by state or local laws, extra health care and administration costs will mean fewer benefits, lower wages or fewer jobs, the GGRA argued in a reply brief filed with the Supreme Court on Sept. 8.

Harsh economic conditions and a lack of definitive Supreme Court guidance mean more jurisdictions are likely to experiment with health care reform models and employer mandates, the association said.

But according to the city, the GGRA is exaggerating the impact of the Ninth Circuit's ruling, both in terms of the possibility of a proliferation of similar pay-or-play laws and the effects that such a proliferation would have.

Joelle Sharman, a partner at Ford & Harrison LLP, said that letting the Ninth Circuit's decision stand would "turn ERISA on its head."

If administering benefits becomes more difficult and more expensive, companies will start questioning whether it's worth it, Sharman said.

She predicted that the nation's highest court would not only agree to hear the GGRA's

appeal, but eventually would overturn the Ninth Circuit.

The GGRA argued that the Ninth Circuit's decision was at odds with the U.S. Court of Appeals for the Fourth Circuit's 2007 ruling in *Retail Industry Leader's Association v. Fielder*.

In the *Fielder* case, the Fourth Circuit affirmed a lower court's ruling striking down a Maryland law that would have forced for-profit companies with more than 10,000 employees to spend at least 8 percent of payroll on employee health insurance.

Even if national health care reform legislation were to pass Congress and be signed into law, the Fourth Circuit and Ninth Circuit decisions could remain in sharp conflict, the GGRA said.

But San Francisco argued there was no conflict between the circuits, and that ERISA did not preempt a local requirement, if employers have a reasonable non-ERISA means for complying with the requirement.

The law at issue in the *Fielder* case — Maryland's Fair Share Act — requires that any covered employer that does not spend 8 percent of its payroll on health insurance pay the difference between what it actually spends and that 8 percent figure to the Maryland secretary of labor, with the company's employees getting no benefit from that payment.

The Fourth Circuit held the Maryland law effectively required Wal-Mart Stores Inc. to alter its ERISA plan because no rational employer would pay money to the state rather than increase health care spending to benefit employees, San Francisco said.

The San Francisco ordinance is different, however, because it offers employers a meaningful alternative for complying under which they can preserve the existing structure of their ERISA plans, while the only option for employers under the Maryland law was a penalty no rational employer would choose, the city argued.

If an employer elects to pay San Francisco, employees can enroll in the city's program at a 75 percent discount, the city said.

According to Ethan Lipsig, there is a legitimate conflict between the Fourth and Ninth circuits' stances. The GGRA case and the *Fielder* cases both involve employers being forced to provide health benefits, Lipsig said.

"In the final analysis, the cases are indistinguishable because they use slightly different techniques to get to the same end," he said.

The GGRA's petition for certiorari has an excellent chance of being granted, Lipsig added, citing the amicus support the case had drawn as well as the importance of the question of whether state and local governments could require employee benefits to be provided.

William Helvestine, a San Francisco-based partner with Epstein Becker & Green PC, said that the petition had good prospects for being granted.

"I think there is enough of a conflict that the Supreme Court should weigh in and express their own view, and not leave it to the Ninth Circuit," Helvestine said.

According to Bacon, U.S. lawmakers — as opposed to the Ninth Circuit's judges — should be the ones to proffer resolutions to the concerns about providing health care coverage.

"The whole complexity of the problem cries out for the reasoned, lengthy legislative debate that you can only hope for in the U.S. Congress," Bacon said.

The GGRA is represented by Nixon Peabody LLP and Employment Law Advocates.

The case is Golden Gate Restaurant Association v. City and County of San Francisco et al., case number 08-1515, in the U.S. Supreme Court.

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