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191 DLR B-1

Health Care

High Court Solicits View of Administration On San Francisco's Play-or-Pay Program

Signaling its interest in the case, the U.S. Supreme Court Oct. 5 invited U.S. Solicitor General Elena Kagan to file briefs in an action that pits a city's attempt to address the health care crisis within its borders against employers' desire for uniform plan design and administration across jurisdictions (*Golden Gate Rest. Ass'n v. San Francisco*, U.S., No. 08-1515, *solicitor general's brief invited* 10/5/09).

Eugene Scalia, co-chair of the Labor and Employment Practice Group at Gibson, Dunn & Crutcher LLP in Washington, D.C., and former solicitor of labor, told BNA Oct. 5 that the order, which asks the solicitor general to express the United States's view on whether the Employee Retirement Income Security Act preempts a key provision of San Francisco's "Healthy San Francisco" program, indicates "an increased likelihood that the Supreme Court will grant review" in the case.

The ordinance in question requires medium and large employers operating within the city to make minimum health care expenditures on behalf of covered employees, either by paying into their own employee benefits plans or into a fund maintained and administered by the city. The Golden Gate Restaurant Association (GGRA), a nonprofit trade organization that promotes the interests of the restaurant industry in the San Francisco Bay Area, challenged the law as preempted by ERISA. The U.S. Court of Appeals for the Ninth Circuit ruled in September 2008 that the federal law does not preempt the city's scheme.

Administration's Views in Question

Earlier in the case, the Labor Department under former President George W. Bush filed amicus briefs with the Ninth Circuit supporting GGRA's position that the ordinance is preempted by federal law. But the Obama administration "has indicated that it is taking a fresh look at the case," the city said in an Oct. 5 statement.

"The Bush Labor Department's position was not simply wrong as a matter of law, it was wrong for fundamentally ignoring the urgent need for health care reform," San Francisco City Attorney Dennis J. Herrera said in the statement. "I am hopeful that the new administration will not take such a knee-jerk position, but will instead thoroughly review the legal and policy implications of the case."

Kevin Westlye, executive director of GGRA, told BNA Oct. 5 that he is not worried that the Labor Department will switch sides. While Westlye said he does not know how the solicitor general will respond to the high court's request, he said he believes that the government's position already has been determined and that its latest brief will be consistent with its prior arguments. "I'm looking forward to finding out" what the government will argue, he said.

Scalia said he would be "very surprised to see the government's brief deviate" from the position it took in the Ninth Circuit, which, he said, reflects the government's "long-standing policy on preemption." The Labor Department historically has maintained a consistent position on ERISA preemption through changes in the administration, Scalia said. It would be "surprising" to see that position reversed, he said, especially in a case in which the department already has taken a stance.

Restaurant Group Sued in 2006

GGRA filed the lawsuit against the city and county in November 2006 (221 DLR A-2, 11/16/06). The U.S. District Court for the Northern District of California held that ERISA preempted the San Francisco law, at least insofar as the ordinance requires employers to make minimum health care expenditures

on behalf of covered employees (248 DLR AA-1, 12/28/07). The court found that the health care expenditure requirements of the ordinance had "an impermissible connection with employee welfare benefit plans."

In late September 2008, a three-judge panel of the Ninth Circuit reversed, finding that ERISA does not preempt the ordinance because the law can be administered in a way that will not interfere with any ERISA plan (546 F.3d 639, 44 EBC 2761 (9th Cir. 2008); 190 DLR AA-1, 10/1/08). Subsequently, the Ninth Circuit declined en banc review over a strong dissent joined by Chief Judge Alex Kozinski (44 DLR A-9, 3/10/09).

GGRA filed a petition for certiorari in the Supreme Court in June. The association argued that the case is ripe for review because the preemption question is "critically important" and "recurring." Already, the federal courts of appeal are divided on the viability of "recent attempts by state and local governments to mandate employer contributions for employee health benefits through the device of 'pay-or-play' laws, sometimes known as 'fair share' laws," GGRA argued.

In its brief in opposition, the city argued that this "case is the wrong vehicle, at the wrong time to consider whether ERISA preempts general health care spending requirements" (163 DLR A-7, 8/26/09). According to the city, "while ERISA preempts laws that dictate employer choices about employee welfare benefit plans, it does not preempt generally applicable laws that merely influence choices with respect to ERISA plans." The city's ordinance falls into the latter category, it said.

The parties disagreed in their briefs about whether the Ninth Circuit's decision directly conflicts with *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180, 39 EBC 2217 (4th Cir. 2007); 11 DLR AA-1, 1/18/07, in which the Fourth Circuit held that a Maryland play-or-pay law was preempted. The city argued that the law at issue in the *RILA* case applied to only one employer—Wal-Mart Stores Inc.—and did not present the employer with any "real choice" other than to create an ERISA plan. GGRA argued, however, that the Fourth Circuit would have reached the same result even if the Maryland law had offered employers a "reasonable choice." The trade association added that "ERISA preemption does not rise or fall based on the relative attractiveness of options to creating or amending an ERISA plan."

Prediction Proves True

Back in June, Deputy San Francisco City Attorney Vincent Chhabria, who argued the case in the Ninth Circuit, predicted that the Supreme Court might ask the solicitor general to weigh in on the matter. At that time, he said it would "be interesting to see the solicitor general's response," noting that President Obama went on the record at a national mayors' meeting as supporting the San Francisco ordinance.

In the Oct. 5 statement, the city attorney's office said "the Supreme Court has effectively postponed a decision" as to whether it would grant or deny GGRA's petition. The city noted that the move was not unusual, saying that, before making a decision on whether to grant review, the high court "often seeks the views of the executive branch" in cases involving the application of federal statutes.

GGRA is represented by Richard C. Rybicki, Patrick B. Sutton, and Deirdre I. Bourdet of Employment Law Advocates in Napa, Calif., and David L. Bacon, Jeffrey M. Tanenbaum, David S. Foster, and Sherwin Kaplan of Nixon Peabody LLP in Los Angeles. The city is represented by Dennis J. Herrera, Wayne Snodgrass, Vince Chhabria, and Christine Van Aken, of the San Francisco City Attorney's Office in San Francisco and Paul R.Q. Wolfson of WilmerHale in Washington, D.C.

By Mary-Anne Pazanowski

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