

Morgan Lewis

ERISA Preemption
and
MA Health Care Reform

U.S. Chamber of Commerce

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ERISA Preemption

- ERISA section 514(a) “shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan”
 - Leads to self insured H&W plans sidestepping traditional state mandates regarding coverage, disease-of-the-month, etc.
- However, state laws regulating insurance, banking and securities are “saved” from preemption by ERISA section 514(b)
 - Leads to full spectrum of state insurance laws applying to H&W plans that purchase insurance coverage instead of self insuring
- 514(b) limited by “deemer” clause of 514(b)(2)(B)

ERISA Preemption (cont.)

- Seems simple enough—self insure your H&W plans and all is solved!
- Unfortunately.....

ERISA Preemption: The Courts

- Long long (*long!*) line of federal cases
 - Could spend the rest of today and tonight discussing the various twists and turns about whether a state law “relates” to an ERISA plan
 - Key cases are:
 - *Shaw v. Delta Airlines* (463 U.S. 85 (1983))
 - *Travelers Insurance Co.* (514 U.S. 645 (1995))
 - *Egelhoff v. Egelhoff* (532 U.S. 141 (2001))
 - Developing trend had been to narrow ERISA preemption
 - *Usually good example of the adage that bad facts = bad law*
- Judges aren’t immune to realities surrounding the “good” of many state efforts to indirectly reach, regulate, and expand access to health coverage—even if a plan is self insured

ERISA Preemption: The Courts (cont.)

- Most recent example: Wal-Mart v. Maryland
 - (Actually Retail Industry Leaders Association v. Fiedler 39 EBC 2217 (2007))
- MD law: if 10,000+ Ees, spend 8% of payroll on health benefits or pay the difference to the state.
 - District and Appellate Court held preempted by ERISA
 - Represents a more expansive reading of ERISA preemption
 - May represent a too-aggressive-by-half approach by MD legislature

ERISA Preemption: The Courts (cont.)

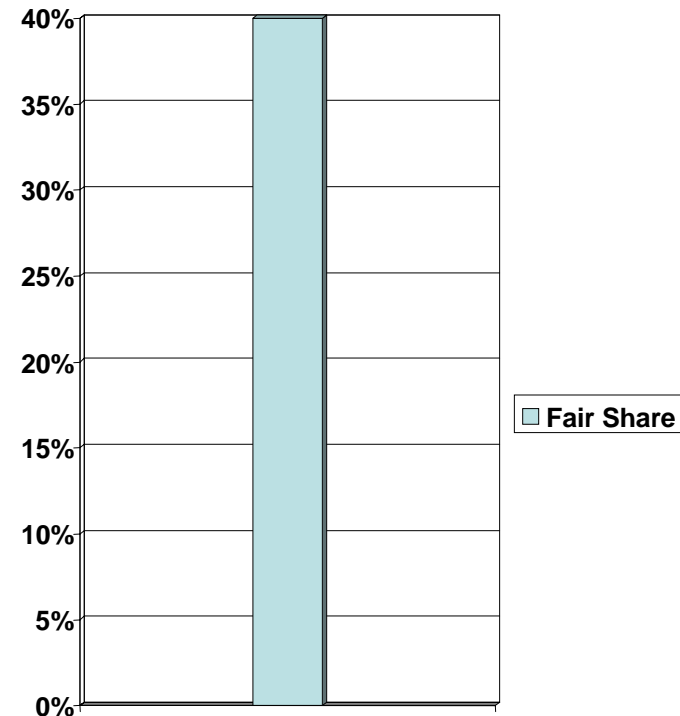
- Fiedler represents the law now in the Fourth Circuit, which encompasses:
 - Maryland
 - North Carolina
 - South Carolina
 - Virginia
 - West Virginia

Massachusetts Health Care Reform

- Establishes mandate for state residents to purchase health insurance that meets creditable coverage rules
 - Enforced through state income tax system
- Contains a number of carefully designed employer mandates
 - Do they relate to an ERISA-governed H&W plan?
 - Should they be preempted by ERISA?
 - Is an ERISA preemption challenge worth the bother?
- Everyone has an opinion, but only a court's opinion counts!

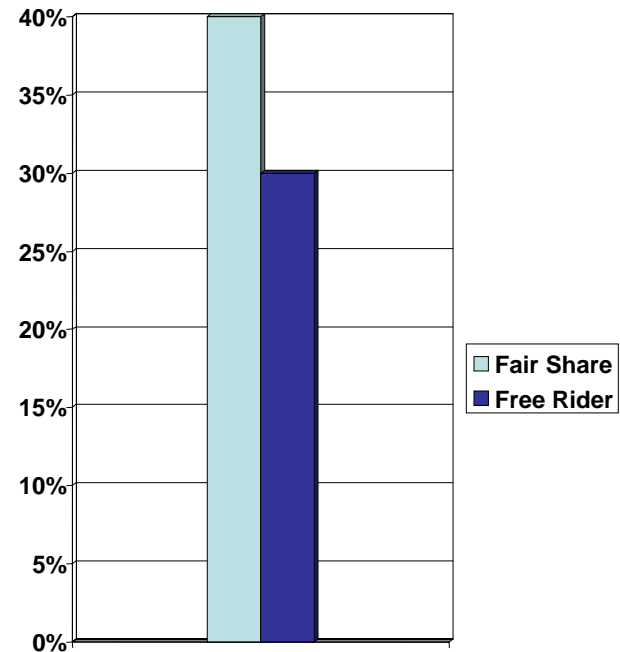
Massachusetts Health Care Reform (cont.)

- Fair Share Contribution
 - Requires a \$295 contribution for each full time MA employee (once ER has 11 or more full time MA employees) unless:
 - *25% or more MA employees participate in a plan the ER makes a contribution to; or*
 - *The employer subsidizes at least 33% of cost regardless of participation rates*
- Preempted? →



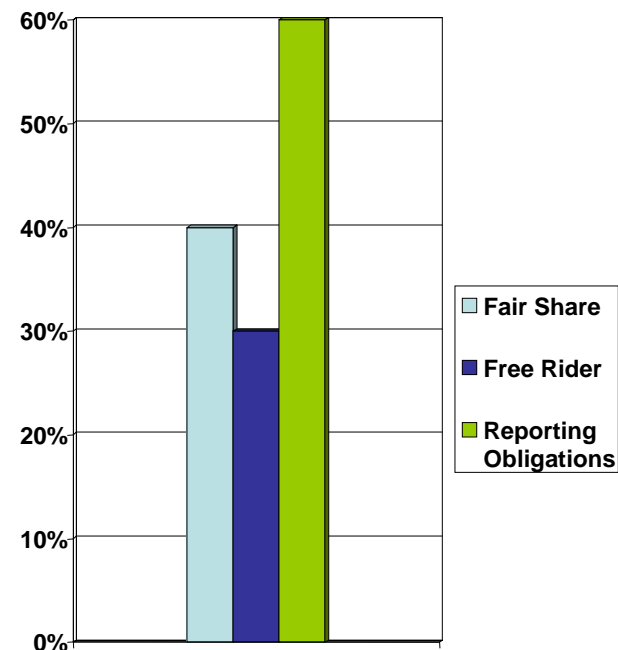
Massachusetts Health Care Reform (cont.)

- Free Rider Surcharge
 - ERs responsible for up to 45% of free coverage obtained by employees
 - Can sidestep surcharge by offering a cafeteria plan
- Preempted? →



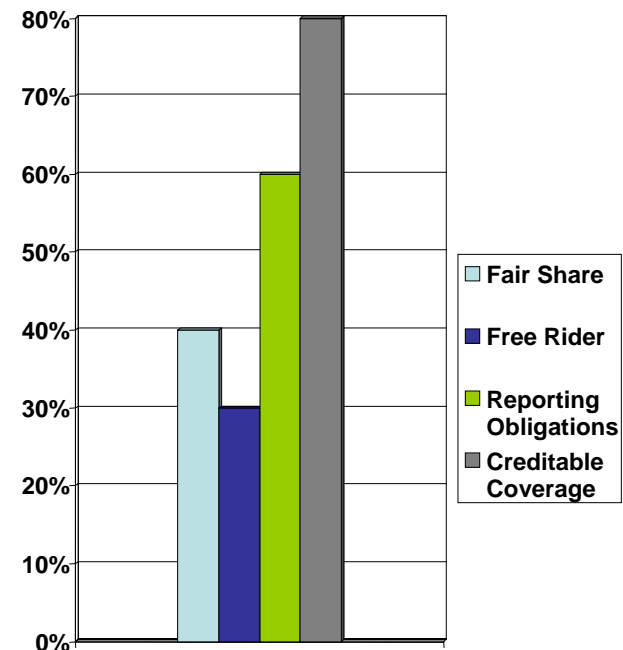
Massachusetts Health Care Reform (cont.)

- Reporting obligations/OE process changes
 - Must annually report to state on employer-wide specifics (ER HIRD form)
 - Must tell employees about MA law and collect signed form if they opt out of coverage (Ee HIRD form)
- Preempted?→



Massachusetts Health Care Reform (cont.)

- Creditable Coverage (2009)
 - Must meet specific rules about level of coverage, deductibles, etc. in order for coverage to satisfy MA individual health insurance mandate
 - Only indirectly applies to employers, but will be the death of mini-med coverage and require significant changes for many plans
- Preempted?→



Possible Federal Changes?

- H.R. 506 (introduced 1/17/2007 by Tammy Baldwin D-WI and John Tierney D-MA) “Health Partnership Through Creative Federalism Act”
 - Creates ERISA waiver process for states to experiment with innovative approaches to health care coverage by applying to new HHS State Health Coverage Innovation Commission
 - Congress approves waiver
 - Hearing May 23 in House Education and Labor Committee's subcommittee on Health, Employment, Labor, and Pensions

Questions?

What is on your mind about the MA law?

Thanks!



Andy R. Anderson

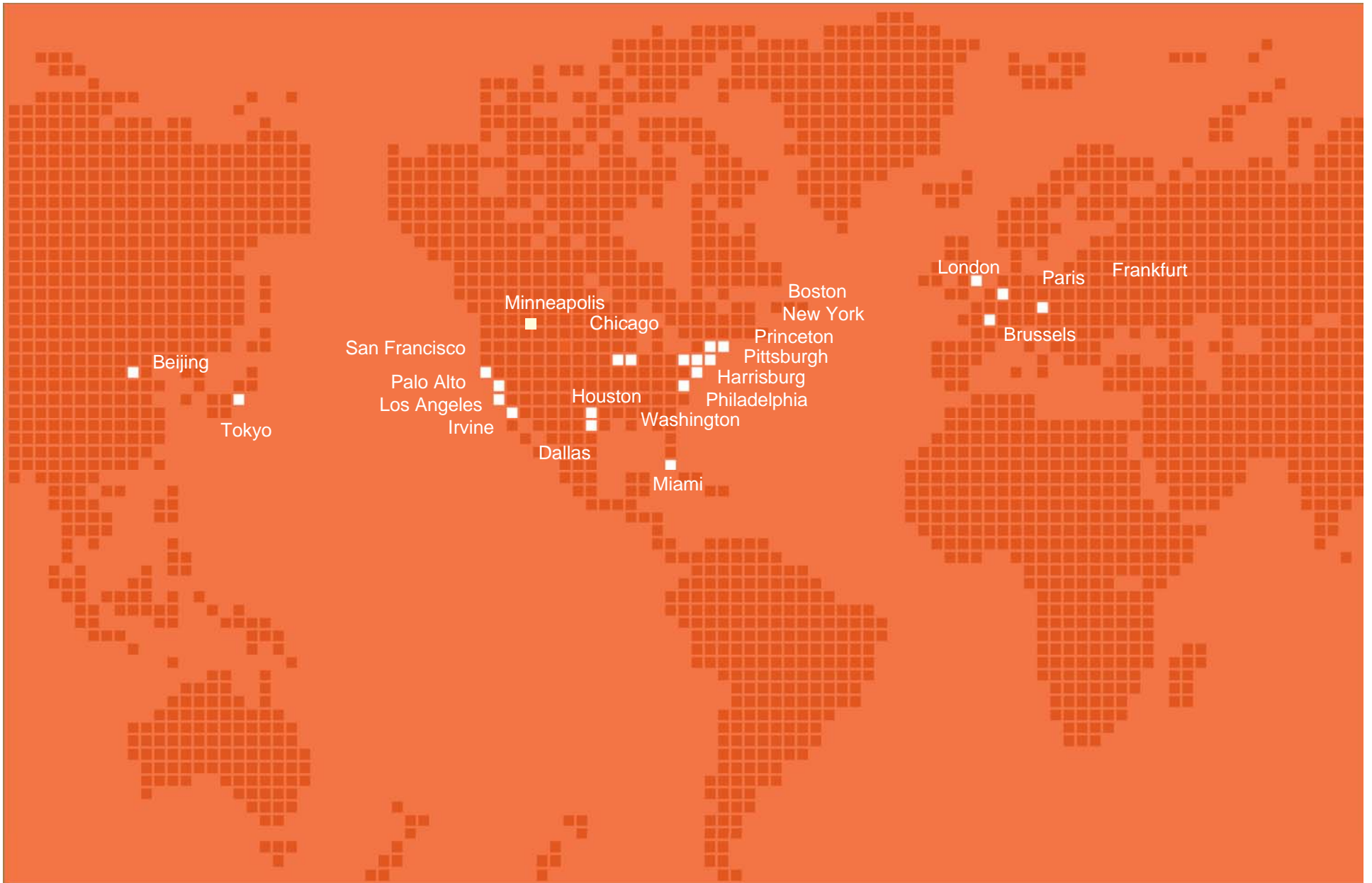
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