

ERISA Does Not Preempt San Francisco Health Ordinance

October 14, 2008

In August 2006, San Francisco's mayor signed into law the San Francisco Health Care Security Ordinance (the ordinance). The ordinance requires certain employers operating within the geographic limits of the City and County of San Francisco (City) to make specified "per hour" health care expenditures on behalf of their San Francisco covered employees. The ordinance was scheduled to take effect on January 1, 2008.

An employers' group, the Golden Gate Restaurant Association (Association), challenged the validity of the ordinance, arguing that it was preempted by the Employee Retirement Income Security Act (ERISA). On December 26, 2007, the U.S. District Court for the Northern District of California agreed, issuing an order granting the Association's motion for summary judgment, thereby invalidating the ordinance.

The City immediately appealed to the U.S. Ninth Circuit Court of Appeals and also sought an emergency stay of the district court's order. On January 9, 2008, the Ninth Circuit granted the City's request for a stay, thereby allowing the ordinance to take effect as of January 1, 2008 while the appeal was pending. For a previous Morgan Lewis Employee Benefits LawFlash that addressed this matter, please go to http://www.morganlewis.com/pubs/LEPG_SanFranHealthCare_LF_10jan08.pdf.

On September 30, the Ninth Circuit U.S. Court of Appeals upheld the San Francisco Health Care Security Ordinance rejecting arguments by the Association and the Department of Labor (DOL) that the law was preempted by ERISA.

The Ninth Circuit decision analyzed well-established ERISA preemption theories, argued by the Association and the DOL, that the ordinance creates a "plan" within the meaning of ERISA or "relates to" an employer's health plan. The Court rejected both arguments reasoning that the ordinance does not require an employer to adopt an ERISA health plan because it gives employers the option of making payments to the City to satisfy the minimum health care expense spending requirement and, therefore, does not create a "plan" within the meaning of ERISA. The Court further reasoned that because the ordinance does not require an employer to provide specific benefits by enhancing an existing health plan, it does not "relate to" an employer's ERISA health plan.

The Ninth Circuit distinguished the Fourth Circuit decision in *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), where it was held that ERISA preempted a similar Maryland

statute. The court reasoned that, unlike the Maryland law, the City’s ordinance was more comprehensive, offering employers a “meaningful alternative” to modifying existing ERISA health plans or establishing new ones. Notwithstanding the Ninth Circuit’s opinion, the Ninth Circuit decision appears to create a conflict with the Fourth Circuit. Accordingly, the Association is expected to petition the Ninth Circuit for a further review by an *en banc* panel or petition the U.S. Supreme Court directly for review.

The immediate effect of the Ninth Circuit decision is that San Francisco employers must comply with the ordinance. Employers with few employees in San Francisco may find it easier to pay the required contribution to the City rather than amend or expand eligibility under their current health plan. Employers with a large number of employees in San Francisco may decide to add a health reimbursement account (HRA) for their San Francisco employees who are ineligible for coverage under the employer’s group health plan. Employers that fail to comply with the ordinance are subject to fines equal to 150 percent of the required contribution under the ordinance.

For more information on the ordinance and the Ninth Circuit’s opinion, please contact one of the following Morgan Lewis attorneys:

Chicago

David Ackerman	312.324.1170	dackerman@morganlewis.com
Andy R. Anderson	312.324.1177	aanderson@morganlewis.com
Brian D. Hector	312.324.1160	bhector@morganlewis.com

Dallas

Riva T. Johnson	214.466.4107	riva.johnson@morganlewis.com
John A. Kober	214.466.4105	jkober@morganlewis.com
Heath Miller	214.466.4118	hmillier@morganlewis.com
Erin Turley	214.466.4108	eturley@morganlewis.com

New York

Craig A. Bitman	212.309.7190	cbitman@morganlewis.com
Gary S. Rothstein	212.309.6360	grothstein@morganlewis.com

Philadelphia

Robert L. Abramowitz	215.963.4811	r Abramowitz@morganlewis.com
I. Lee Falk	215.963.616	ilfalk@morganlewis.com
Robert J. Lichtenstein	215.963.5726	rlichtenstein@morganlewis.com
Joseph E. Ronan, Jr.	215.963.5793	jronan@morganlewis.com
Steven D. Spencer	215.963.5714	sspencer@morganlewis.com
Mims Maynard Zabriskie	215.963.5036	mzabriskie@morganlewis.com

Pittsburgh

John G. Ferreira	412.560.3350	jferreira@morganlewis.com
Lauren Bradbury Licastro	412.560.3383	llicastro@morganlewis.com
R. Randall Tracht	412.560.3352	rtracht@morganlewis.com

San Francisco

D. Ward Kallstrom	415.442.1308	dwkallstrom@morganlewis.com
Nicole A. Diller	415.442.1312	ndiller@morganlewis.com
Karen H. Peteros	415.442.1650	kpeteros@morganlewis.com

Washington, D.C.

Jessica R. Bernanke	202.739.5447	jbernanke@morganlewis.com
Althea R. Day	202.739.5366	aday@morganlewis.com
Mary B. Hevener	202.739.5982	mhevener@morganlewis.com
Gregory L. Needles	202.739.5448	gneedles@morganlewis.com
Dean R. Morley	202.739.5989	dmorley@morganlewis.com

About Morgan, Lewis & Bockius LLP

Morgan Lewis is a global law firm with more than 1,400 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend in emails, please see <http://www.morganlewis.com/circular230>.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states.
Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2008 Morgan, Lewis & Bockius LLP. All Rights Reserved.