National Center for Policy Analysis

BRIEF ANALYSIS
No. 162
For immediate release:
Friday, May 5, 1995

The Case for ERISA

What President Clinton was unable to create at the national level — a comprehensive health care plan — many governors and health policy experts want to implement state by state.

But the only way they can do so is to persuade Congress to waive their compliance with the Employee Retirement Income Security Act of 1974 (ERISA). That act permits companies to self-insure, and remain free from state oversight, control and taxation. Since it also limits the ability of states to pass comprehensive health care plans, many in Congress are pushing to let states have waivers.

ERISA will be one of the primary health care reform battlegrounds for the 104th Congress. Former Senate Finance Committee Chairman Daniel Patrick Moynihan (D-NY) said last fall: "The failure to enact national reform should not be allowed to prevent states from moving ahead with their own reforms. In fact, in the absence of universal coverage you must allow state flexibility, fostered by ERISA waivers."

Should Congress allow states to interfere in self-funded health insurance plans? The answer is no. Here's why.

ERISA limits state control. Many states passed health care legislation in 1993-94 in anticipation of national health care reform. Some of the state-based plans depend on total or near-total employer participation. At the time, supporters argued that only by forcing all employers to participate and to pay part of the premium could the state guarantee universal coverage, adequate benefits and quality care. The legislation that passed often included a standard benefits package and imposed cost-containment standards. Moreover, the states' ability to fund their plans was based, in large part, on their ability to set the premiums and tax all employers. ERISA prohibits both and leaves the states virtually powerless to enforce comprehensive health care reform. Thus many governors and several members of Congress who favored Clinton-style national health care are looking to ERISA waivers to save their failed state health care reform efforts.

But wouldn't permitting comprehensive state plans increase the number of insured? The evidence suggests just the opposite.

More people are insured because of ERISA. Currently, about 140 million Americans receive their health insurance through some type of self-funded health insurance. ERISA permits employers to design benefit plans that fit both their employees' needs and their companies' finances. As a result of ERISA, more people are insured.

By contrast, state control over traditional health insurance policies offered within the state has resulted in higher premiums, forcing many employers to cancel their policies and leaving their employees uninsured. Even some of the smallest businesses, for whom ERISA was never intended, have moved into self-funded plans in an effort to keep affordable health insurance. Currently, about 6 percent of those with 10 to 49 employees self-insure.

The ERISA reform that is needed would expand rather than limit the act, so that even more employers can take advantage of the freedom it permits.

ERISA makes insurance more affordable. Self-funding makes coverage more affordable for two reasons: ERISA limits the ability of states to mandate specific benefits and to tax health insurance plans.

Congress created ERISA, in part, so that large employers could avoid the costly burden of state mandates that tell insurers what services and providers they must cover in order to sell health insurance in the state. Such mandates force employers either to purchase Cadillac plans loaded with extra benefits such as acupuncture and in vitro fertilization or to forgo health insurance altogether. The phenomenal increase in state mandates — from eight in 1965 to more than a thousand today — has forced many employers to cancel their coverage or to

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escape the mandates by self-insuring under ERISA.

Critics contend that employers who are moving to self-funding are trying to avoid offering adequate health insurance coverage. The truth is that they are making extreme efforts to *maintain* health insurance coverage for their employees. The National Center for Policy Analysis estimates that as many as one in four uninsured people lack health insurance because state mandates are so costly. By avoiding the mandates, companies can continue to keep their employees covered.

State legislators also want access to self-funded plans in order to tax them, which is currently prohibited under the ERISA exemption. Not only would state taxes make health insurance more expensive for employees, but the states would be able to exercise control over plan benefits through tax incentives and penalties. States have at least indirect control over anything they can tax.

ERISA permits health insurance uniformity. A primary benefit of the federal law is that multistate companies can construct one health insurance policy for all employees. Without ERISA, such companies would have to modify their health insurance policy for each state — and might have to deal with up to 50 different plans.

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State-to-state variations could lead to several problems. First, employees might complain of unfair treatment, since those in some states might have much more comprehensive coverage and a greater total compensation package than those in neighboring states.

Such complaints could induce companies to increase their benefits packages to meet the requirements of the most demanding states and simultaneously reduce wages or postpone wage increases to pay for the increases. Conversely, companies might cancel their policies, raise employee wages and avoid future problems.

Moderate ERISA reform. Besides the more radical ERISA reform proposals, there are also moderate reform proposals that would leave large companies exempt from state oversight, but let the states intervene in medium-sized self-funded plans, say, those with under 1,000 employees. Such compromises are just attempts to accommodate large companies while forcing compliance on smaller, less powerful firms.

Federal control vs. state control. Because the states are clamoring for ERISA waivers, some in Congress perceive this as a federalism battle. Why, they ask, should the federal government prohibit the states from intervening in self-funded health insurance plans? Shouldn't state legislators have the right to oversee the plans, their benefits and their reserves?

Supporters of ERISA waivers argue that preemption of the federal ERISA law would return control of health insurance to the states, letting them regulate health the insurance marketplace as they choose. But the real issue here is commerce as determined by the U.S. Constitution, not federalism as established under the Tenth Amendment.

Deferring to federal authority when an issue affects several states is an established principle and is not antifederalist. For example, states have oversight over most crimes occurring within their borders, but the FBI enters the picture when the crimes cross state lines. Interstate issues require a national policy.

Conclusion. ERISA has helped us move toward a national goal: the provision of affordable health insurance. It must remain intact — or be expanded so that even smaller employers can benefit. ERISA is the closest political compromise to having a "national" health plan without national control.

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