

**Testimony of the Maryland Department of Health and Mental Hygiene
Health Care Reform:
Recommendations to Improve Federal and State Initiatives
Committee on Education and Labor
Subcommittee on Health, Employment, Labor and Pensions
May 22, 2007**

Chairman Andrews, Ranking Member Kline, and members of the Subcommittee, my name is John Colmers. I am the Secretary of the Maryland Department of Health and Mental Hygiene. I appreciate the opportunity to testify before you today on state health care reform efforts, the challenges posed by the federal Employee Retirement Income Security Act (ERISA), and opportunities to improve coordination of federal and state initiatives.

Background

ERISA was adopted in 1974 with the reasonable goal of allowing multi-state employers to offer comparable benefits across state lines. ERISA preempted state regulation of employee benefit plans. It has had the effect of exempting the health benefits offered by self-funded employers from any regulatory oversight. This occurred because the federal government did not issue regulations for health coverage comparable to those it issued for defined benefit pensions. The combination of preemption and lack of federal action created a regulatory vacuum that exempts health coverage offered by self-funded employers from any oversight. This vacuum segments the insurance market for which the state versus the federal government is primarily responsible. In Maryland, about half of individuals with private sector employer-sponsored insurance are covered by self-funded plans.

The majority of individuals still get their health insurance through their employer. Recent declines in employer-sponsored insurance account for much of the growth in the uninsured; but employer-sponsored insurance remains the centerpiece of our nation's health financing system. The preference for employer-sponsored insurance is embedded in the federal tax system with about \$200 billion in tax incentives to purchase insurance through employers.

Voluntary Efforts to Improve Employer-Sponsored Insurance

States have tried to implement a number of voluntary measures to increase the number of individuals who receive health insurance coverage through their employer, or more recently, to halt the erosion of employer-sponsored insurance. Most of these state initiatives have attempted to provide low-cost or subsidized products for employers to offer their workers. To date, these voluntary initiatives have had modest success.

Several states have created voluntary programs that offer subsidies to encourage employers to offer insurance or offer subsidized insurance to low-income workers. The

enrollment experience of these programs has usually been well below program goals. Further, the majority of uninsured who are helped by these programs enroll as individuals rather than through their employers. So these efforts have done little to improve the rate of employer-sponsored insurance. Other state initiatives to improve employer-sponsored insurance have also had modest success. For example, many states have passed laws that allow insurance carriers to sell products that do not include all of the state-required benefits. These limited benefit plans have had very low enrollment. This was the case with Maryland's limited benefit policy – after a year of being offered, only one group enrolled with 10 individuals.

Voluntary policies have had limited success in strengthening or sustaining the employer-sponsored insurance system, leaving states to consider mandatory approaches. To the extent that the strategies place requirements on employers regarding health benefits, they run head into the federal preemption of ERISA.

Maryland's experience with the *Fair Share Health Care Fund Act* is an example of how state reforms that affect employers are challenging because of ERISA. The *Fair Share Health Care Fund Act* gave employers with 10,000 or more employees a choice: either spend at least 8% (6% for nonprofit employers) of their payroll on health insurance costs or pay the difference into a fund that supports the Medicaid program. This policy responded to the growing body of evidence that many low-income workers or their dependents are covered by state Medicaid, SCHIP programs, or are uninsured. The *Fair Share Health Care Fund Act* was struck down by the Federal District Court which held that the law would have required an employer to expand its ERISA health plan which could interfere with the uniform national administration of the firm's plan. In January 2007, the Fourth Circuit Court of Appeals upheld the lower court's decision. The State has dropped any further appeal of the decision. Many policy makers and legal scholars have debated whether or not a "pay or play" approach is allowable under ERISA, but it is clear that states attempting these approaches face a long and potentially contentious process with the courts.

In addition to the obstacle of federal preemption, states find it difficult to go too far in imposing requirements on employers. States have borders and need to remain economically competitive with their neighbors. The only state that has an employer mandate in place is Hawaii. Hawaii's law preceded ERISA and received specific exemption. Further, it is the only island state, sharing borders with thousands of miles of ocean.

A sustainable strategy to cover the nation's 47 million uninsured is likely to build off the base of employer-sponsored insurance. State reforms that affect employer-sponsored insurance are important because they test new ideas. However, comprehensive reforms that affect employers need to come from the national level because of the legal limitation of ERISA as well as the practical limitations on how aggressive states can be in imposing requirements on employers.

Modifications to ERISA

In the absence of national health care reform, states will continue to move ahead with what they can. Certainly, we are seeing evidence of that now with many Governors and Legislatures moving ahead on reforms. ERISA does not allow for state waivers. Therefore, unless there is a favorable court ruling state-specific exemptions would need to be authorized legislatively. While Congress may consider granting such exemptions, it could in the meantime adopt more modest changes that could help states move forward. ERISA could be modified to allow states to test reforms that may be more practical for them to implement. These include:

1. Explicitly allow states to apply premium taxes to employer plans. Currently, states have largely leveraged funds through assessments on the delivery system rather than direct assessments on employers. The Supreme Court held this was allowable in its 1995 *Travelers*¹ ruling. A premium tax would allow an assessment to be specifically targeted; whereas an assessment on the delivery system has the effect of raising costs for all users of the health system, including those without insurance.
2. Allow states to collect data from ERISA plans. Currently states do not have the authority to collect information on who and what is covered by ERISA plans. This is critical information for state regulators to understand what is going on in their insurance market.
3. Set a federal floor on benefits. Because of ERISA preemption states are not able to define the scope of benefits provided by ERISA plans. A federal floor for benefits or standardization of benefits would assure adequacy of coverage for individuals receiving health benefits through an ERISA plan.
4. Strengthen consumer protections for those covered by ERISA plans. Maryland approved strong consumer protections and oversight several years ago, but those protections do not apply to individuals covered by ERISA plans. Currently, limited federal oversight is provided by the Department of Labor. This oversight should be strengthened and enforcement should be coordinated with states.

Conclusion

States have tried voluntary strategies to encourage employers to offer insurance. These strategies have resulted in only modest enrollment. So far, the courts have interpreted ERISA as preventing states from considering mandatory strategies with employers. The need for states to remain economically competitive also limits their ability to consider mandatory strategies. Strategies to universally expand coverage that build on the employer sponsored insurance system ultimately need to come from the national level.

¹ *N.Y. State Conf. of Blue Cross & Blue Shield Plans v Travelers Insurance*, 514 U.S. 645 (1995).

In the absence of national health care reform, states can be important testing grounds for reforms. There are specific changes to ERISA that could help pave the way for more states to act.

I appreciate the opportunity to testify and thank you for taking up this important issue.