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According to the Supremacy Clause of the United States Constitution, state or local laws are void insofar as they conflict with a federal statute.1 Section 514(a) of the Employee Retirement Income Security Act of 1974 (“ERISA”), therefore, preempts any and all state laws that “relate to” an employee benefit plan governed by ERISA.2 In Golden Gate Rest. Ass’n v. San Francisco (Golden Gate IV),3 the United States Court of Appeals for the Ninth Circuit held that section 514(a) of ERISA did not preempt the employer spending requirements of the San Francisco Health Care Security Ordinance (“HCSO”) that obligated employers to pay a certain amount per employee in health care expenditures.4

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4 Id. at 661 (holding San Francisco Health Care Security Ordinance not preempted by ERISA). On October 5, 2009, the Supreme Court requested that the Solicitor General file a brief expressing the federal government’s view of the matter and after review of the brief, the Supreme Court will decide whether to hear the case. See Golden Gate IV, 130 S. Ct. at 357; see also City & County of San Francisco Labor Standards Enforcement, Health Care Security Ordinance, 2010,
In August of 2006, the City and County of San Francisco ("the City") enacted the HCSO, which mandated the creation of a comprehensive health care reform program designed to address the issue of uninsured residents of San Francisco.5 The HCSO required that employers pay a fixed amount to the City on behalf of each employee unless the employer spent a certain amount per employee in health care expenditures.6 In addition to the spending requirement, the HCSO required employers to "maintain accurate records" of these expenditures but did not require them to maintain the records "in a particular form."7 Further, a city fund, the Health Access Program ("HAP"), would be available to all uninsured or underinsured San Francisco residents regardless of their employment status and would deliver health care to all participants through a network of providers.8

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5. S. F., CAL., ADMIN. CODE ch. 14 § 1 (2007), available at http://www.municode.com/content/4201/14131/HTML/ch014.html. The HCSO was adopted after the legislature conducted a study finding that approximately 82,000 adult San Francisco residents were uninsured, half of whom were employed. Id. The study further found that San Francisco taxpayers bore the cost of paying for emergency room visits and other high cost health care needs for the uninsured. Id.

6. See § 14.3(a) (requiring health care expenditures); § 14.1(b)(8)(a)-(c) (defining health care expenditure rate). The HCSO required that businesses that employ 100 employees or more per week pay $1.60 per hour per employee and that businesses with twenty to ninety-nine employees per week pay $1.06 per hour per employee. § 14.1(b)(8)(a)-(c). Businesses with twenty or fewer employees per week and non-profit businesses with forty-nine employees per week or less were exempt from the health care spending requirements. See § 14.1(b)(3) (defining "covered employer"). The HCSO calculated the required expenditure by multiplying the applicable rate outlined in section 14.1(b)(3) by the total number of hours paid for each of its covered employees during a quarter. § 14.3(a) (detailing required expenditure). Further, the HCSO defined health care expenditures as contributions to health savings accounts, direct partial or full reimbursement to employees for expenses incurred in the purchase of health care services, payments to third parties for purpose of health care service (insurance), or payments by the employer to the City. § 14.1(b)(7).

7. See § 14.3(b)(i) (requiring maintenance of accurate records). An employer must provide the City with "reasonable access to such records," and if the employer fails to comply with those requirements, it will be "presumed that the employer did not make the required health expenditures for the quarter for which records are lacking, absent clear and convincing evidence otherwise." Id. See also § 14.3(b)(ii) (discussing other employer requirements, such as mandating employers give information to Office of Labor Standards Employment).

8. See § 14.2(c). The program was open to all uninsured residents of San Francisco and did not exclude persons based on a preexisting condition. Id. (defining eligibility). Enrollees of the program would pay quarterly participation fees on a sliding scale basis to receive the benefits under the HAP or as it is now referred Healthy San Francisco. § 14.2(g). See also Department of Public Health, Participant Costs (2009), http://www.healthysanfrancisco.org/visitors/Participant_Costs.aspx (explaining HAP program costs). Nonresidents who were employed in San Francisco...
On November 8, 2006, the Golden Gate Restaurant Association ("Golden Gate") brought suit against the City challenging the HCSO and seeking declaratory and injunctive relief on the grounds that the HCSO's spending requirement was preempted by ERISA. Upon a motion for summary judgment by both parties, the district court granted Golden Gate's motion for summary judgment and issued an injunction on the grounds that the HCSO's health care expenditure requirements were related to employee welfare benefit plans and thus preempted by ERISA. The court reasoned that the HCSO interfered with employer plan administration and disrupted the uniform national regulation of coverage. Moreover, the court determined that the HCSO's provisions made unlawful references to employee benefit plans because they referred to, acted

would not qualify for HAP participation, but the HCSO established a medical reimbursement account from which these nonresident employees could draw for medical expenses. § 14.2(g). See also Department of Public Health, Medical Reimbursement Accounts (2009) http://www.healthy sanfrancisco.org/employees/Medical_Reimbursement_Accounts.aspx (detailing medical reimbursement accounts). HAP focused on preventative care and outlined a minimum level of medical services that residents should receive. § 14.2(f) (including preventative care, diagnostic services, and emergency care).


10 Golden Gate II, 535 F. Supp. 2d at 975 (holding HCSO preempted).

11 Id. The district court stated that ERISA allows employer discretion in the establishment and maintenance of employee benefit plans so that "private parties, not the Government, control the level of benefits" under ERISA plans. Id. (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511 (1981)). The court reasoned that the HCSO impermissibly affected the relationship between employers and their healthcare beneficiaries because the HCSO required that employers meet certain levels of employee benefits, complete various administrative tasks, and alter the structure and administration of their ERISA plans. Golden Gate II, 535 F. Supp. 2d at 975-77. Moreover, the HCSO interfered with nationally uniform plan administration because the HCSO required that employers consider the spending requirements of each locality in order to comply with potentially conflicting requirements. Id. at 977-78.
immediately upon, and could not operate without, the said employee benefit plans. The City appealed the judgment to the Ninth Circuit Court of Appeals and asked the court to stay the judgment, allowing the HCSO to go into effect pending its decision on the merits.

Congress enacted ERISA in 1974 to uniformly regulate pension plans and health benefit plans. Within this regulation scheme was a clause preempting “any and all State laws insofar as they may now or hereafter relate to any employee health benefit plan covered by ERISA.” In 1983, the Supreme Court held in *Shaw v. Delta Air Lines, Inc.* that a New York statute requiring employers to provide benefits to their pregnant employees was preempted by ERISA because the law “clearly ‘relate[s] to’” an employee benefit plan. In *Shaw*, the Court also articulated an ERISA preemption test that stated that ERISA preempted any state or local law that “has a connection with or reference to” an ERISA plan.

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12 *Id.* The district court found that the HCSO was preempted because the determination as to whether an employee was covered and what the amount the employee was entitled to under the HCSO referenced amounts already paid under private ERISA plans. *Id.* at 978.

13 Golden Gate Rest. Ass’n v. San Francisco (*Golden Gate III*), 512 F.3d 1112, 1114 (9th Cir. 2008) (stating procedural history). Prior to the aforementioned motion to the appellate court, the City filed an emergency motion in the district court for a stay of the district court’s judgment pending appeal that was denied. *Id.* at 1115.


16 *Shaw*, 463 U.S. at 100 (noting the New York law “relates to” an employee benefit plan). In *Shaw*, Delta Air Lines, Burroughs Corporation, and Metropolitan Life Insurance Company provided their employees with medical and disability benefits through plans subject to ERISA but did not provide benefits to employees disabled by pregnancy as required by New York’s Human Rights Law. *Id.* See also N.Y. Exec. Law § 296.1(a) (McKinney 1982). Each party brought three separate actions for federal declaratory judgment arguing that New York’s Human Rights Law was preempted by ERISA. *Shaw*, 463 U.S. at 92. The district court in each case held that the Human Rights Law was preempted insofar as it required employers to provide benefits to their pregnant employees and the Second Circuit affirmed. *Id.* at 93-94. See also Delta Air Lines, Inc. v. Kramarsky, 666 F.2d 21, 26 (2d Cir. 1981); Metropolitan Life Ins. Co. v. Kramarsky, 666 F.2d 26, 26 (2d Cir. 1981); Burroughs Corp. v. Kramarsky, 666 F.2d 27, 27 (2d Cir. 1981). The Supreme Court affirmed and held that the New York Human Rights Law was preempted by ERISA because the law required employers to pay employees specific benefits, namely benefits to pregnant employees. *Shaw*, 463 U.S. at 97.

17 *Id.* at 96-97 (emphasis added) (preempting New York law directly regulating employer contributions and structure of health benefit plans). See also D.C. v. Greater Washington Bd. of Trade, 506 U.S. 125, 129 (1992) (applying *Shaw* and preempting D.C. law requiring employers to provide health care coverage for certain employees); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) (applying *Shaw*); WSB Elec., Inc. v. Curry, 88 F.3d 788, 791 (9th Cir. 1996)
In 1992, the Supreme Court held in District of Columbia v. Greater Washington Board of Trade that a state law requiring employers to provide health insurance coverage for injured employees eligible for worker’s compensation benefits was preempted by ERISA because the state law imposed a requirement on employers with reference to ERISA benefit programs. In contrast, in 1995, the Supreme Court, in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., held that a New York law that imposed a surcharge on patients with most commercial insurers except Blue Cross/Blue Shield did not impermissibly "relate to" ERISA because the statute only indirectly affected “the relative prices of insurance policies.” In 1996, the Ninth Circuit further expanded on the Travelers test in WSB Elec., Inc. v. Curry, when considering a California statute establishing a minimum wage that could be met through a combination of wages and employee benefits. The Supreme Court held that the California law did not “relate to” ERISA plans because the law only had “tenuous, remote, or peripheral” economic effect on employee benefit plans.

(same); Standard Oil Co. of Cal. v. Agsalud, 633 F.2d 760, 764-66 (9th Cir. 1980) aff’d, 454 U.S. 801 (1982) (same).


19 See N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995) (holding New York surcharge not preempted by ERISA). In Travelers, several commercial insurers sought to invalidate a New York law that imposed a surcharge on patients with most commercial insurers except Blue Cross/Blue Shield. Id. at 650 (explaining statute). The hospital billed patients with Blue Cross/Blue Shield coverage at a hospital’s Diagnostic Related Group (“DRG”) rate but billed all other insurers at the DRG rate plus a 13% surcharge that was retained by the hospital. Id. The district court held that ERISA preempted the statute on the grounds that the statute had a “significant effect” on commercial insurers and that the statute “will increase the cost of obtaining medical insurance through any source other than the Blues.” Id. at 651-52. The Second Circuit affirmed that judgment, however the Supreme Court reversed on the grounds that the California prevailing wage law had no effect on ERISA plans "but simply take them into account when calculating the cash wage that must be paid out." Id. at 793.

20 See WSB Elec., Inc., 88 F.3d at 790-91 (summarizing statute); see also CAL. LAB. CODE §§ 1771, 1773 (West 2009), available at http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=lab&codebody=. The statute involved a “two-tier” system mandating employers to pay employees a minimum wage but allowing the employers to do so through a combination of cash and wages. WSB Elec., Inc., 88 F.3d at 791. The statute further imposed an “excess benefit cap” whereby the employer could not credit more than a fixed amount of benefit contributions towards the prevailing wage. Id. at 791. Several contractors brought a motion for summary judgment arguing that the statute was preempted by ERISA that the district court denied finding that the statute was not preempted by ERISA. Id. at 790-91. The Ninth Circuit affirmed reasoning that the California prevailing wage law had no effect on ERISA plans “but simply take them into account when calculating the cash wage that must be paid out.” Id. at 793.

21 See WSB Elec., Inc., 88 F.3d at 793 (stating holding).
One year later, in 1997, the Supreme Court, in *Cal. Div. of Labor Stds. Enforcement v. Dillingham*, considered a California statute requiring a contractor on a public works project to pay the prevailing wage in the project's location unless the contractor employed workers participating in an approved apprenticeship program.\(^2\) The Supreme Court held that the law was not preempted by ERISA on the grounds that the statute did not have a "relate to" ERISA plans because the California law merely "alters the incentives, but does not dictate the choices, facing ERISA plans."\(^2\) Most recently, in *Egelhoff v. Egelhoff*, the Supreme Court held that a Washington statute providing that the designation of a spouse as the beneficiary of nonprobate assets, such as a life insurance policy, was preempted by ERISA because the statute conflicted with ERISA's requirements.\(^2\)

Several state and local legislatures believed that the *Travelers* test, considering the effect and binding nature of state statutes, provided sufficient breathing room to implement legislation mandating that employers provide certain levels of financial contributions to health care plans.\(^2\) For example, Massachusetts, Maine, Vermont, and


\(^{2}\) See Greater Washington Bd. of Trade, 506 U.S. at 320 (reasoning statute imposing requirements with reference to covered programs preempted). In *Dillingham*, the Supreme Court considered a California statute requiring a contractor on a public works project to pay the prevailing wage in the project's location. See *Dillingham*, 519 U.S. at 320. The law provided for an exception that allowed a contractor to pay lower wages to workers participating in an approved apprenticeship program. *Id.* Dillingham Construction, a contractor subject to the statute, argued that the California law was preempted by ERISA on the grounds that apprenticeship programs were employee benefit plans under ERISA, so the California law "related to" an ERISA plan. *Id.* at 323-24. The Supreme Court rejected the argument and held that the law was not preempted by ERISA on the grounds that the statute did not have a "connection with" ERISA plans because the California law merely "alters the incentives, but does not dictate the choices, facing ERISA plans." *Id.* at 334.

\(^{2\text{a}}\) See *Dillingham*, 519 U.S. at 334 (holding state law not preempted).

\(^{2}\) See *Egelhoff v. Egelhoff*, 532 U.S. 141, 143, 147-48 (2001). In *Egelhoff*, the Supreme Court held that ERISA preempted a Washington intestate statute that would have treated an ex-spouse as if she predeceased the decedent, so it would direct the payment under the life insurance policy and pension plan to decedent's heirs at law. See *id.* at 150.

Maryland enacted “pay-or-play” health reform statutes requiring employers to spend a designated amount on employee health care plans or pay the equivalent amount as a tax or fee.26 Despite these efforts, some of these states and municipalities have encountered difficulties in implementing health care reforms due to ERISA’s preemption clause.27 For example, in Retail Indus. Leaders Ass’n v. Fielder, the Fourth Circuit held that a Maryland pay-or-play statute was preempted by ERISA on the grounds that it effectively


27 See supra notes 16-24 and accompanying text (discussing preemption jurisprudence). As of the publication of this Comment, there have been four state and three local pay-or-play initiatives. See PATRICIA A. BUTLER, INCLUDING EMPLOYER FINANCING IN STATE HEALTH REFORM INITIATIVES: IMPLICATIONS OF RECENT COURT DECISIONS 2-3 (2009), http://www.academyhealth.org/files/publications/SCI_EmpFinancing.pdf (collecting state and local initiatives); see also David Pratt, The Past, Present and Future of Health Care Reform: Can It Happen?, 40 J. MARSHALL L. REV. 767, 798-802 (2007) (discussing enacted and proposed state health reform statutes); LaFrance, supra note 26, at 221-31 (discussing state initiatives). While some of these statutes have been challenged on ERISA grounds, many still survive and are being implemented. See Butler, supra at 1-2 (discussing status of initiatives). One example of a surviving statute is the Massachusetts universal health care statute that in part requires employers who do not offer group health plans to pay a per employee contribution to the state. See Massachusetts’s Act Providing Access to Affordable, Quality, Accountable Health Care: Fair Share Employer Contribution, MASS. GEN. LAWS ch. 149, § 188(a) (2007). While many commentators have hypothesized as to why this particular statute has not been challenged, it continues to remain in force and has enjoyed a considerable degree of success. See Edward A. Zelinsky, The New Massachusetts Health Law: Preemption and Experimentation, 49 WM. & MARY L. REV. 229, 282 (2007) (hypothesizing lack of litigation is result of compromises made during law’s enactment); Daniel Ranellone, Article, Trial and Error: Examining ERISA § 514(a) Preemption of Employer “Fair Share” Laws in the Aftermath of Golden Gate Restaurant Association v. City and County of San Francisco, 27 BUFF. PUB. INT. L.J. 63, 91 (2008) (same).
mandated employers to provide benefits at a certain level.\textsuperscript{28}

In \textit{Golden Gate Rest. Ass'n v. San Francisco}, the Ninth Circuit held that ERISA did not preempt the San Francisco Health Care Security Ordinance.\textsuperscript{29} The Ninth Circuit prefaced its opinion by noting that the HCSO did not require employers to establish their own ERISA plans or make changes to their existing ERISA plans and further stated that the HCSO was merely concerned with health care spending rather than health care benefits.\textsuperscript{30} The court then concluded that the HCSO was not preempted by

\textsuperscript{28} See Fielder, 475 F.3d at 198 (preempting statute on grounds state law had impermissible "connection with" plans); see also Retail Indus. Leaders Ass'n v. Suffolk County, 497 F. Supp. 2d 403, 418 (E.D.N.Y. 2007) (same). In Fielder, the Fourth Circuit considered whether Maryland's Fair Share Act, which required Maryland employers to spend a certain percentage of their payrolls on employees' health insurance, was preempted by ERISA. Fielder, 475 F.3d at 198. The Fourth Circuit held that the Maryland statute was preempted by ERISA because it directly regulated ERISA plans and effectively mandated that employers provide benefits at a specified level. \textit{Id.} at 195-96. The Fourth Circuit noted that the choices of Maryland's Act did not provide "meaningful alternatives" by which an employer could comply with the Act without altering or affecting its ERISA plan. \textit{See id.} at 196-98 (analyzing options). The Court of Appeals further noted that a decision by an employer to pay the state rather than its employees would be unreasonable and irrational because an employer would realize many benefits by increasing health care spending directly on its employees but suffer greater losses by paying that same amount to the state. \textit{See id.} at 193 (noting costs and benefits). Likewise, in Retail Indus. Leaders Ass'n v. Suffolk County, the court held that ERISA preempted a Suffolk County Act reasoning that the Act at issue was "substantially similar" to the preempted Maryland Act. Suffolk County, 497 F. Supp. 2d at 416. The court noted that although the Act provided employers with options "separate and apart from altering their ERISA plans, in reality the Act does not provide feasible alternatives by which an employer can increase its healthcare spending" to comply with the Act. \textit{Id.} at 417-18 (quoting Fielder, 475 F.3d at 193-94, 196-97) (analyzing practicality of options).

\textsuperscript{29} See Golden Gate Rest. Ass'n v. San Francisco (\textit{Golden Gate IV}), 546 F.3d 639, 642 (9th Cir. 2008) (holding HCSO not preempted). The appellate court had previously granted the City's motion to stay on the grounds that the City was very likely to succeed on the merits of its case because the HCSO did not require employers to adopt an ERISA plan nor was the existence of an ERISA plan essential to the law's operation. \textit{See id.} at 643. The Ninth Circuit employed the test announced in \textit{Travelers and Dillingham} in holding that the HCSO was not preempted. \textit{See supra} notes 19, 23 and accompanying text (summarizing tests).

\textsuperscript{30} \textit{Golden Gate IV}, 546 F.3d at 646-47. In arriving at these two observations, the court described five categories of employers under the HCSO and determined the requirements the HCSO imposed on each. \textit{Id.} at 645. The first category included employers that have no ERISA plans. \textit{Id.} Second were employers that have ERISA plans for all of their employees and met the health care expenditure for each employee. \textit{Id.} Third were employers that have ERISA plans for some employees and spent the required expenditure for those employees only. \textit{Id.} Fourth were employers that have ERISA plans for all employees but did not meet the health care expenditure required for each employee. \textit{Id.} at 645-46. Fifth were employers that have ERISA plans for some employees and spent less then the required health care expenditure for each employee. \textit{Id.}
ERISA because it did not “relate to” a covered employee benefit plan for purposes of section 514(a) because the San Francisco statute did not have an impermissible “connection with” or “reference to” such a plan. Under the first prong of the test, the Ninth Circuit reasoned that the HCSO did not have a “connection with” an ERISA plan because the HCSO neither required the employer to establish an ERISA plan nor did it require an employer to provide specific benefits through an existing plan. The court then noted that the ordinance had only an “indirect economic influence” on employee benefit plans and was not binding on plan administrators.

In analyzing the second prong of the test, the court reasoned that the HCSO did not have an impermissible “reference to” ERISA plans because the HCSO neither acted immediately and exclusively upon ERISA plans nor was the existence of ERISA plans essential to the law’s operation. The HCSO did not act immediately and exclusively upon ERISA plans because, similar to the statute involved in *WSB Electric, Inc.*, the HCSO did not measure obligations by referencing the level of benefits provided by the ERISA plan; rather, benefits were measured by reference to payments provided by the employer to an ERISA plan. Therefore, the Ninth Circuit held that unlike other local laws mandating health care expenditures, the statute in this case was not preempted under ERISA because it did not have an impermissible “connection with” nor reference to ERISA plans. Moreover, the Ninth Circuit reasoned that its holding did not create

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31 Id. at 654 (employing the *Dillingham* and *Travelers* tests). In further determining if the HCSO was preempted under ERISA, the Ninth Circuit reasoned that the city payment option did not create an employee welfare benefit “plan” because the benefits were similar to their wages and employers had minimal administrative burdens under the HCSO. *Id.* at 648-52. The Ninth Circuit further reasoned that the HCSO was not an ERISA plan itself because the HCSO created a government entitlement program rather than a plan and, therefore, was not preempted on those grounds. *Id.* at 653.

32 *Id.* at 655-56 (stating HCSO required only health care expenditures not benefits).

33 *Id.* at 656 (analogizing to statute implicated in *Travelers*). Further, the HCSO did not bind employers to a particular rule or plan governing eligibility or entitlement and did not impose an administrative burden on employers. *Id.* at 656-57.

34 *Id.* at 657 (citing Cal. Div. of Labor Stds. Enforcement v. *Dillingham*, 519 U.S. 316, 325 (1997)). The Ninth Circuit reasoned that the HCSO was analogous to that involved in *WSB Electric, Inc.* because employers need not have any ERISA plan to comply with the statute. *Id.* at 657-59. The statute is not preempted because it is “fully functional even in the absence of a single ERISA plan.” *Id.* at 659.

35 *Golden Gate Rest. Ass’n v. San Francisco* (*Golden Gate IV*), 546 F.3d 639, 658-59 (9th Cir. 2008) (distinguishing measuring units).

36 *Id.* at 660-61. The court reasoned that its holding did not conflict with the finding in *Fielder* because unlike the statute considered by the Fourth Circuit, the San Francisco HCSO provided employers with rational and realistic alternatives to ERISA plans. *Id.* at 659-60. The city payment option established in the HCSO provided “tangible benefits” to employees when an
a circuit split with the Fourth Circuit by distinguishing the two statutes on the grounds that the HCSO provides employers with meaningful choices thus allowing them to maintain their ERISA plans.\textsuperscript{37}

While the Ninth Circuit's holding permits the type of health care reform many have demanded, the court erred in its analysis by reasoning that the statute at issue did not have a "connection with" nor a "reference to" an ERISA plan.\textsuperscript{38} In holding that the HCSO was not preempted by ERISA, the Ninth Circuit first erred in reasoning that the HCSO did not have a "connection with" an ERISA plan.\textsuperscript{39} The Ninth Circuit determined that the HCSO only had an "indirect economic influence" on employers, yet the statute at issue directly addressed health benefit plans and imposed upon employers the "unavoidable obligation" to make a health care payment on behalf of its employees.\textsuperscript{40} Thus, the HCSO was more akin to the preempted health benefit related statutes in \textit{Egelhoff}, \textit{Greater Washington}, and \textit{Shaw}\textsuperscript{41} rather than the wage and tax ordinances that were held valid in \textit{Dillingham}, \textit{Travelers}, and \textit{WSB Elec., Inc.}, respectively.\textsuperscript{42}

In addition, the Ninth Circuit erred in reasoning that the HCSO did not have an impermissible "reference to" an ERISA plan because the court erred in arguing that the HCSO is conceptually similar to the California prevailing wage statute involved in \textit{WSB Elec., Inc.} \textsuperscript{43}employer paid the City and so created a "meaningful alternative that allow[ed] them to preserve the existing structure of their ERISA plans." \textit{Id.} at 660.

\textsuperscript{37} \textit{Id.} at 659-60 (distinguishing statutes and reconciling holdings of the cases).

\textsuperscript{38} See \textit{infra} notes 39-52 and accompanying text (discussing errors).

\textsuperscript{39} See \textit{Golden Gate IV}, 546 F.3d at 654-58 (distinguishing conflicting cases); see also \textit{supra} note 25 and accompanying text (discussing demand for health care reform).

\textsuperscript{40} \textit{Id.} at 656 (noting influence). Moreover, the HCSO imposed a burden on plan administrators and, therefore, had a "connection with" an ERISA plan on that ground as well. \textit{Id.} at 546 F.3d at 657 (arguing HCSO does not burden the ERISA plan). The Ninth Circuit noted that the HCSO burdened employers but argued that this alone was not sufficient for preemption because the statute must also burden the ERISA plan itself. \textit{Id.} (stating reasoning). This analysis however is erroneous. See \textit{Shaw} v. \textit{Delta Air Lines, Inc.}, 463 U.S. 85, 105 n.25 (1983) (noting preemption intended to minimize administrative burden on employers).


The two cases are distinguishable when considering the degree of constraints that each placed on employer's choices. In *WSB Elec., Inc.*, the state law required that the employer pay a prevailing "wage" and the employer could calculate a certain amount of health care expenditures in that calculation. In contrast, the HCSO required an employer to pay a certain amount in "health care expenditures" and so mandated that an employer account for her ERISA payments when determining whether she meets the statutorily required expenditure. Therefore, the HCSO acted immediately and exclusively upon an ERISA plan and so had an impermissible "reference to" ERISA.

Moreover, the Ninth Circuit incorrectly distinguished the HCSO from the statute involved in *Retail Indus. Leaders Ass'n v. Fielder*, thus creating a circuit split with the Fourth Circuit. The Ninth Circuit argued that in contrast to the Maryland statute involved in *Fielder*, employers affected by the HCSO have a "meaningful alternative that allows them to preserve the existing structure of their ERISA plans." Yet, the statute at issue in this case was substantially similar to the statute involved in *Fielder*, as the two statutes provided analogous alternatives by which an employer could increase her health care spending. Moreover, while the City payment option was a more attractive option

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43 See *Golden Gate Rest. Ass'n v. San Francisco* (*Golden Gate IV*), 546 F.3d 639, 658-59 (9th Cir. 2008) (analogizing statutes); *WSB Elec., Inc.*, 88 F.3d at 793-4 (reasoning prevailing wage statute had no effect on ERISA plans); see also *supra* note 21 and accompanying text (discussing *WSB Elec., Inc.*).

44 See *infra* note 45-47 and accompanying text (distinguishing cases).

45 See *WSB Elec., Inc.*, 88 F.3d at 791 (summarizing statute). According to the Ninth Circuit in *WSB Elec., Inc.*, the employer must pay employees the prevailing wage, and it may do so through a combination of cash and benefits." *Id.* (emphasis added).


47 See *Dillingham*, 519 U.S. at 325 (preempting statute where law acted immediately and exclusively upon ERISA plan). Using the categories the Ninth Circuit announced in its holding, the employers that would be mandated to calculate their health care expenditure with a reference to their ERISA payments would include all categories but the first one. See *supra* note 30 and accompanying text (describing categories). The HCSO was thus more akin to the statute involved in *Greater Washington*, where the law "impos[ed] requirements by reference to" an ERISA program and, therefore, should be preempted. *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130-31 (1992).

48 See *supra* note 28 (discussing fourth circuit rationale in holding similar statute preempted); see also *infra* notes 49-52 and accompanying text (noting circuit split).

49 Compare *supra* note 6 (describing HCSO requirements), with *supra* note 28 (outlining Maryland Fair Share Act requirements).

50 See S.F., CAL., ADMIN. CODE ch. 14 §14(b)(7) (2007), available at http://www.municode.com/content/4201/14131/HTML/ch014.html (defining included "health care expenditure"). Similar to the Maryland Fair Share Act, the HCSO provided the employer with the choice of establishing
than the one offered in Fielder, it was nonetheless rational for employers to increase their spending in an existing ERISA plan rather than pay the City the difference.\(^{51}\) Although this may cause confusion among the lower courts and state legislatures, increasing the chance that this matter will have to be resolved by the Supreme Court, the Supreme Court may not need to resolve the conflict should Congress enact health care reform.\(^{52}\)

This circuit split will produce the very confusion Congress sought to avoid in the area of employee health benefits.\(^{53}\) Moreover, the split will provide little guidance to state legislatures in developing and implementing health care reform, an area where many have demanded change.\(^{54}\) Despite this confusion, the circuit split between the Fourth and Ninth Circuits may not need to be resolved by the Supreme Court should Congress enact federal health care legislation that would preempt state legislation under the United States Constitution.\(^{55}\) Federal health care legislation thus could render the split within the circuits a moot point and provide relief to many in need of health care reform.\(^{56}\)

In the case of Golden Gate Rest. Ass'n v. San Francisco, the Ninth Circuit held that the Employee Retirement Income Security Act did not preempt the Health Care Security Ordinance. This holding was in error because the HCSO had an impermissible "connection with" and "reference to" an ERISA plan and, therefore, was preempted. Moreover, the Ninth Circuit incorrectly created a split with the Fourth Circuit by distinguishing the HCSO from the statute held preempted by the Fourth Circuit. While the Ninth Circuit's holding answered the much anticipated demand for health care reform, the Ninth Circuit erred in their analysis and San Francisco's HCSO should have been held to be preempted by ERISA.

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\(^{51}\) See Fielder, 475 F.3d at 193 (discussing consequences when exercising City-payment option).

\(^{52}\) See infra notes 53-56 and accompanying text (noting probable effects of case).

\(^{53}\) See supra note 14 and accompanying text (noting legislative intent)

\(^{54}\) See supra note 25 and accompanying text (noting call for health care reform); see also supra notes 6, 26 and accompanying text (noting state and local health reform laws).

\(^{55}\) See supra note 1 and accompanying text (discussing field preemption).

\(^{56}\) See supra notes 25-26 and accompanying text (noting call for health care reform).