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CASE BRIEF:

FAIR SHARE LAWS

Amy Vandenbroucke

Overriding Maryland Governor Robert Ehrlich's veto, Maryland legislators enacted the "Fair Share Health Care Fund Act" (Act) on January 12, 2006.¹ This law, the first of its kind, requires companies with more than 10,000 employees in Maryland to spend at least eight percent of payroll on health care or contribute the difference to the state Medicaid fund.² Failure to comply with the Act results in a mandatory \$250,000 fine.³ Of the four companies in Maryland which fit the Act's criteria, only Wal-Mart does not currently meet the eight percent threshold.⁴ As a result, the law has been dubbed the "Wal-Mart law."⁵ Since its passage, approximately 30 other states have introduced similar legislation and the Retail Industry Leaders Association (RILA) has initiated a lawsuit against the Act.⁶ The Act is scheduled to go into effect in 2007.⁷

BRIEF HISTORY OF EMPLOYER SPONSORED HEALTH CARE

Health care coverage benefits for employees are a retailer's most expensive employee benefit, but these benefits have not always been offered.⁸ Prior to World War II, individuals paid for medical care on a fee for service basis, paying for the care they received when they received it.⁹ In the 1920s, the

¹ S.B. 790, 2006 Leg., 421th Sess. (Md. 2006). Associated Press, *Retail Group Plans Challenge of Wal-Mart Law*, Seattle Post-Intelligencer (Feb. 7, 2006), available at <http://seattlepi.nwsourc.com>.

² *Id.*

³ Linda Coady, *Retail Group Sues to Block Laws Targeting Wal-Mart*, FindLaw (Feb. 24, 2006), at <http://news.findlaw.com>.

⁴ *Id.* Online NewsHour: *Maryland Bill Requires Health Care Changes for Wal-Mart*, Online NewsHour Health Debate (Feb. 13, 2006) at www.pbs.org. The three other companies are: supermarket chain Giant Food, defense contractor Northrop Grumman, and Johns Hopkins University. *Id.*

⁵ Retail Group, *supra*, note 4. It is also known as "pay or play" health care mandates. Press Release from Retail Industry Leaders Association, Legislative Overview, available at www.retail-leaders.org.

⁶ Legislative Overview, *supra*, note 5.

⁷ Online NewsHour, *supra*, note 4.

⁸ Press Release, Retail Industry Leaders Association, Legislative Leadership, available at www.retail-leaders.org.

⁹ Melissa Thomasson, *Health Insurance in the United States*, EN.net Encyclopedia (April 18, 2003), available at <http://www.eh.net/encyclopedia/article/thomasson.insurance.health.us>.

role of medicine shifted the focus of treatment of illness from people's homes to hospitals.¹⁰ This shift, in addition to an increase in demand for health care, for standards of quality for physicians and hospitals and the cost of supplying medical care, resulted in increased medical care costs.¹¹ The increase in costs led to the development of health insurance in the 1930s and 40s, when the pre-cursors for Blue Cross and Blue Shield health insurance programs started, offering a new way of paying for medical care that revolutionized the health insurance market.¹² During the 1940s, health insurance companies started offering insurance policies to employers for employee groups; however, employers did not start consistently offering health insurance until World War II.¹³ During the war, employers were forbidden from raising wages.¹⁴ In order to secure old and recruit new employees, employers began offering other benefits, such as health insurance, in lieu of increased wages.¹⁵ The foundation of employer-provided health insurance was reinforced by two major rulings in the 1940s and favorable tax treatment of employer-provided contributions to employee health insurance plans during the 1940s and 50s.¹⁶ By the 1960s, the system of private health insurance was well established.¹⁷

From the 1950s until the end of the century, employers continued to provide health insurance to their employees, the federal government encouraged this through passing laws protecting employee health insurance benefit rights, states began mandating what benefits insurance companies

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Thomasson, *supra*, note 9. "Under the 1942 Stabilization Act, Congress limited the wage increases that could be offered by firms, but permitted the adoption of employee insurance plans." *Id.*

¹⁵ *Id.*

¹⁶ *Id.* The two rulings were: (1945) the War Labor Board ruled that employers could not modify or cancel group insurance plans during the contract period; and (1949) the National Labor Relations Board ruled in a dispute between the Inland Steel Company and the United Steelworkers Union that the term "wages" included pension and insurance benefits. This ruling was later affirmed by the U.S. Supreme Court. *Id.* The favorable tax advantages included: "First, employers did not have to pay payroll tax on their contributions to employee health plans. Further, under certain circumstances, employees did not have to pay income tax on their employer's contributions to their health insurance plans. The first such exclusion occurred under an administrative ruling handed down in 1943 which stated that payments made by the employer directly to commercial insurance companies for group medical and hospitalization premiums of employees were not taxable as employee income. While this particular ruling was highly restrictive and limited in its applicability, it was codified and extended in 1954. Under the 1954 Internal Revenue Code, employer contributions to employee health plans were exempt from employee taxable income."

Id.

¹⁷ *Id.*

needed to cover and Americans' views of receiving health insurance plans through their employers as part of their basic compensation package was strengthened. In 1955, the Bureau of Labor Statistics, under the U.S. Department of Labor, started annually publishing the "Digest of Selected Health and Insurance Plans," documenting the costs of supplementary wage benefits, including hospital benefits, maternity benefits, surgical and medical benefits and major medical benefits.¹⁸ That the government was compiling this data annually suggests that employer-provided health care was the norm, even an expectation of the American workers. Additionally, the passage of the Medicare and Medicaid programs, which provided health care benefits for Americans over 65 years of age and indigent Americans, reinforced the notion that health care was a basic right, although no law or court ruling ever specifically stated the idea.¹⁹

The development of Americans' expectations of health insurance with respect to employer-sponsored health insurance is important in analyzing Maryland's new law because the Act holds employers responsible for paying for their employee's health care. This assumes that employers, large employers anyway, are responsible for the health care for a certain number of Americans and suggests that employees of large employers have the right to expect health care benefits from their employers.²⁰ Legally, "health insurance, like it or not, is a voluntary benefit that employers provide to their employees."²¹ Nonetheless, supporters of the Act point out that non-unionized companies, such as Wal-Mart, are leading the rush to cut wages and health care benefits in order to be competitive.²² These supporters, in defending the Act, are implying that placing competitiveness over employee health care is wrong. However, even if those companies do offer health care plans, non-union businesses are unable to force their employees into their medical plan.²³ So the company will pay for the employee's medical care, regardless of the employee's decision to be part of the company-sponsored health plan.²⁴

¹⁸ Richard E. Schumann, *Compensation from World War II through the Great Society*, U.S. Department of Labor, Bureau of Labor Statistics (Jan. 30, 2003), at <http://www.bls.gov/pub/cwc/cm20030124ar04p1.htm>.

¹⁹ Thomasson, *supra*, note 9.

²⁰ Online NewsHour, *supra*, note 4.

²¹ Tom Hester, *Health-care Bill Aimed at Big N.J. Employers*, NJ.com (Feb. 7, 2006), available at www.nj.com.

²² Online NewsHour, *supra*, note 4.

²³ *State Should Spurn Anti-Wal-Mart Bill*, Rocky Mountain News (Jan. 19, 2006), available at www.rockymountainnews.com.

²⁴ This means that employees who did not want to pay the premiums will still have their care covered under state sponsored health care programs, if the employees are eligible, without costing them anything.

FOCUSING ON LARGE EMPLOYERS

Large employers are easy targets for laws such as Maryland's Act. Legislators are easily able to convince their constituents that these "play or pay" laws are necessary; they argue that the large employer provides inadequate medical coverage for its employees and, because of the company's policy, tens of thousands under- or un-insured employees of the company have been forced onto Medicaid, the state-sponsored health program for low income individuals, which leaves the large employer able to increase their profits with taxpayers' money.²⁵ Opponents argue that taxpayers will pay either way. Either they will pay through taxes going towards Medicaid or through higher prices at the store, since laws such as Maryland's Act raise the cost of doing business and businesses will pass on those extra costs to their customers.²⁶

Furthermore, raising the cost of business may prompt Wal-Mart and other large employers to either leave the state or hire fewer people, which would result in the state paying health care costs and unemployment benefits.²⁷ This is already the case in Maryland where Wal-Mart's plans to open a distribution center in Somerset County fell through.²⁸ The center would have provided 800 jobs initially, and then approximately 282 "ripple effect" jobs.²⁹ Overall, it would have boosted Maryland's poorest county's economy and private-sector employment by 20 percent, as well as and produced an estimated additional \$19.2 million in state and local tax revenues.³⁰ A second Wal-Mart distribution center in Maryland also appears to have fallen through; it was planned for Garret Bounty, which has a poverty rate of 70 percent above the state average.³¹ Opponents of the Act argue that it is bad public policy since the Act does not address health care coverage issues in a meaningful way.³²

The Florida Retail Federation (FRF) asserts that many large employers want to provide health care benefits to all their employees, but health care costs have skyrocketed in the past few years, making it

²⁵ *Spurn, supra*, note 23. One Pennsylvania state representative said "we need to protect taxpayers from subsidizing large corporations that can afford to provide health care to their employees." Amy Worden, *Many Wal-Mart Workers Use Medicaid*, The Philadelphia Inquirer, March 2, 2006, available at www.philly.com.

²⁶ *Issue of the week: Making Companies Pay For Health Care*, The Week, 39, Jan. 27, 2006.

²⁷ *Id.*

²⁸ Don Brunell, *Washington View: Union-Backed Pay-or-Play Laws Put Jobs At Risk*, The Columbian (Feb. 14, 2006), available at www.columbian.com.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Bill Would Force Wal-Mart To Pay More For Employee Health Care*, Macon.com (Feb. 14, 2006), available at www.macon.com.

impossible.³³ In 2005, health care premiums increased 9.2 percent and are projected to increase another ten percent in 2006.³⁴ These skyrocketing costs are the reason so many smaller businesses are dropping health care benefits as well.³⁵ Additionally, FRF argues that while some larger employers may be able to provide health care benefits without a problem, it is unfair to single them out.³⁶ If the country wants to say that health care insurance is an individual right, then the government needs to have that debate, rather than having state governments lay responsibility on large employers.³⁷

RILA opposes Maryland's law for several reasons. First, RILA claims the law takes a "one size fits all" approach that strips employers of any flexibility to meet the needs of their employees.³⁸ Second, the law fails to recognize the uniqueness of the retail industry.³⁹ Specifically, retail generally hires younger employees, who are often healthy and more likely to decline employer health insurance programs.⁴⁰ Retail employees are more likely to work part-time and have coverage provided to them through a spouse or their parents.⁴¹ Retailers have a high turnover for employment rates, which affects employee eligibility for health care coverage programs.⁴² Finally, retail is a competitive industry with modest profit margins and, when states are singling out such businesses by forcing them to pay more for health care benefits, the businesses suffer, employment rates drop and nothing is ultimately done to address the real problem in health care- the exploding health care costs.⁴³

WAL-MART

Wal-Mart specifically is an easy target for legislators not only because of its size- it currently has 1.3 million employees- but because of an internal memo leaked to the public last fall. The New York Times published a memo in which a Wal-Mart executive admitted that many of their employees were priced out of the company's health care coverage plan.⁴⁴ Additionally, the memo stated that five percent of Wal-Mart's employees were on Medicaid and 46 percent of the children of employees were either uninsured or

³³ David Royse, *Bill Would Require Minimum Health Care Spending by Big Employers*, The Ledger (Feb. 13, 2006), available at www.theledger.com.

³⁴ Legislative Overview, *supra*, note 5.

³⁵ Online NewsHour, *supra*, note 4.

³⁶ Royse, *supra*, note 33.

³⁷ *Id.*

³⁸ Overview, *supra*, note 34.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Overview, *supra*, note 34.

⁴⁴ Online NewsHour, *supra*, note 4.

participating in public health programs.⁴⁵ Under the mounting criticism from organized labor groups, Wal-Mart ended up offering new lower-premium insurance in an attempt to increase the number of its employees on company plans.⁴⁶ Wal-Mart started offering plans with premiums as low as \$23 or, in certain locations that have special deals with medical providers, \$11 per month.⁴⁷ These plans, called the “value plans,” cover three physician visits and three prescriptions per family member each year.⁴⁸ After that, families must meet a \$1,000 deductible before broad coverage is available.⁴⁹

The company claims that these new low premiums have resulted in 70,000 more employees enrolled in Wal-Mart plans for the first time.⁵⁰ Further, the company cites an increase of 43,000 employees covered from January 2005, when 568,000 employees were enrolled in company plans, to January 2006, when 615,000 employees were enrolled.⁵¹ Wal-Mart has said that the company’s next goal was to make the \$11 monthly premium rate available to half of all US employees by 2007.⁵² Additionally, the company wants to expand the 2005 trial run of a dozen in-store clinics aimed at providing lower-cost non-emergency health care to the public to more than 50 stores in 2006.⁵³ Finally, Wal-Mart is looking to reduce the two-year waiting period currently required for a part-time employee to qualify for benefits.⁵⁴ The new waiting period has not yet been determined.⁵⁵

In direct response to the various introduced legislation mimicking Maryland’s Act, Wal-Mart points out that it is the number one employer of the disabled and welfare-to-work participants, which contributes seven percent of its employees receiving Medicaid.⁵⁶ Additionally, Wal-Mart officials claim that they are being singled out because of their size, when, based on their size, the company is more likely to have employees on state health insurance programs than a smaller business.⁵⁷

⁴⁵ *Id.*

⁴⁶ Marcus Kabel, *Wal-Mart Plans Improved Health Benefits*, USA Today (Feb. 23, 2006), available at www.usatoday.com.

⁴⁷ *Id.*

⁴⁸ Online NewsHour, *supra*, note 4.

⁴⁹ *Id.*

⁵⁰ Kabel, *supra*, note 46.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Ylan Q. Mui, *Wal-Mart Says It Will Improve Health Benefits*, The Washington Post, Feb. 24, 2006. Available at www.washingtonpost.com (last accessed Feb. 28, 2006)

⁵⁵ *Id.*

⁵⁶ R.A. Dillon, *Democrat Demands Wal-Mart Pay Fair Share of Health-Care Costs*, Fairbanks Daily News-Miner (Feb. 16, 2006), available at www.news-miner.com. For details of specific bills, please see the “Legislation” section below.

⁵⁷ *Id.*

MARYLAND'S LAW

Maryland's law was enacted to force large employers, specifically Wal-Mart, to improve the health care benefits they offer to their employees to decrease the number of their employees without coverage or who participate in public health insurance programs, such as Medicaid.⁵⁸ Health care advocates claim the law was in response to the growing, nation-wide resentment of average citizens and small businesses who are tired of subsidizing large companies who do not pay their fair share of health care.⁵⁹

One thing none of the articles discussing Maryland's Act or similar legislation mention, however, is what is meant by "fair share." Alaska Representative Democrat Eric Croft stated that "fair share" meant large companies providing "a fair health-care plan for their employees."⁶⁰ But, as stated above, employers are not legally obligated to provide insurance, nor can non-unionized companies compel their employees to pay premiums for health care plans. Nonetheless, state legislators that are introducing "pay or play" legislation are quick to point out their bills will only affect one, or a few, large employers that are not conforming to the norm in their state of providing health care coverage.⁶¹

It is unknown how many Wal-Mart employees or dependents in Maryland are participating in public health programs or uninsured.⁶² But Maryland is unique because of a law setting hospital payments statewide that, in effect, forces employers to provide coverage for their employees to help bear the cost of treating the uninsured.⁶³ As a result of this unique law and the knowledge that some of Wal-Mart's employees are uninsured, other large employers in Maryland, such as Giant Food, fought for the enactment of the Act saying that they were actually paying the costs of care for Wal-Mart's uninsured employees and wanted Wal-Mart to take responsibility for those employees.⁶⁴ Although Wal-Mart still has not stated how much it spends on health benefits for employees in Maryland, the company has acknowledged that the Act will require them to pay more than they have been in prior years.⁶⁵

⁵⁸ OnLine NewsHour, *supra*, note 4.

⁵⁹ *Id.*

⁶⁰ Dillon, *supra*, note 56.

⁶¹ For example, Maryland supporters pointed out that Wal-Mart was one of the four large employers who were not putting in at least eight percent of their payroll toward employee health insurance. See also the "legislation" section under "Responses to Maryland's Law."

⁶² Online NewsHour, *supra*, note 4.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

RESPONSES TO MARYLAND'S LAW

Legislation

The model legislation drafted by organized labor in Washington D.C., on which Maryland's new law is based, provides that an employer employing a specific number of employees from the state in which the bill was passed is required to allocate a specific percentage of their payroll to employee health care.⁶⁶ If the employer fails to meet the spending requirement, the difference must be paid to a state fund set up by the act to defray state expenditures for health care.⁶⁷ The model legislation also included a \$500,000 penalty for failure to comply and prohibits employers from off-setting the cost of compliance against wages.⁶⁸ Sources have cited anywhere from 26 to 33 states introducing such legislation in the current session. Below is a sample of bills introduced:

- In Florida the bill would require businesses with more than 10,000 employees to spend at least nine percent of total worker earnings on health care or pay the difference to a Fair Share Health Care Fund. Currently, Wal-Mart has 4,900 employees and their dependents on state-financed health plans whereas the next two employers, Publix and McDonald's, had 4,129 and 3,500, respectively.⁶⁹
- Washington's bill defined large employers as companies with at least 5,000 workers in the state and required a nine percent contribution rate, but this bill was defeated late in February 2006.⁷⁰ Legislators are drafting a new version of this bill for next year. Supporters of the bill estimated that the state spent about \$12 million on the 3,180 of Wal-Mart employees on Medicaid or who had received the benefits for their dependents in 2004.⁷¹ There are about 16,000 Wal-Mart employees in Washington.⁷²
- Georgia's bill would require employers with 10,000 or more employees in Georgia to spend at least eight percent of their payroll

⁶⁶ Press Release from Retail Industry Leaders Association, Legal Overview: Discriminatory Health Care Mandates, *available at* www.retail-leaders.org.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ John Dorschner, *Bill Calls for Firms to Pay for Care*, The Miami Herald (Feb. 15, 2006), *available at* www.miami.com.m

⁷⁰ Curt Woodward, *State Government Had Thousands of Workers Receiving Medicaid*, The Seattle Times (Feb. 13, 2006), *available at* <http://seattletimes.nwsourc.com>.

⁷¹ *Id.*

⁷² Chris McGann, *Wal-Mart Bill Pits Chopp Against Party*, Seattle Post-Intelligencer (Feb. 14, 2006), *available at* <http://seattlepi.nwsourc.com>.

on employee medical benefits.⁷³ A 2002 survey in Georgia found that 10,261 children covered by Georgia's PeachCare for Kids health insurance had a parent working for Wal-Mart.⁷⁴

- In Colorado businesses with at least 3,500 employees would be required to spend at least 11 percent of their payroll on health care coverage.⁷⁵ Additionally, businesses would be required to disclose the number of part-time and full-time employees and the amount spent on health care.⁷⁶
- Rhode Island's bill would require companies with more than 1,000 employees to spend eight percent of their payroll on health care coverage.⁷⁷ Of the 38 employers who qualify, only six do not currently meet the potential eight percent requirement.⁷⁸
- In New Jersey, companies with 1,000 employees, but who do not pay a minimum wage of \$4.17 per hour on health care per worker, would be required to pay that amount per worker into a special state fund, which would be used to help finance health care for under- or uninsured employees and their families.⁷⁹ This bill would cost those businesses approximately \$7,500 per year per worker, whereas health insurance costs businesses about \$5,000 per individual.⁸⁰
- Alaska's bill would require employers with more than 2,000 employees to spend at least eight percent of their payroll on employee health care.⁸¹

As of February 25, 2006, no other state has passed legislation like Maryland's Act. It is noteworthy that these bills are being introduced at a time when the states are facing budget problems and increasing Medicaid expenses, which take up a large portion of any state's budget. In Alaska, Medicaid expenses composed 40 percent of the state Department of Health and Social Services' \$607 million budget in 2005.⁸²

⁷³ Macon.com, *supra*, note 32.

⁷⁴ *Id.*

⁷⁵ Lindsay Renick Mayer, *Health Help For Workers*, The Coloradoan (Feb. 14, 2006), available at www.coloradoan.com.

⁷⁶ *Id.*

⁷⁷ Reed Abelson and Michael Barbaro, *Law Aimed at Wal-Mart May be Hard to Replicate*, The New York Times, (Jan. 16, 2006), available at www.nytimes.com.

⁷⁸ *Id.*

⁷⁹ Tom Hester Jr. *Health-Care Bill Aimed at Big N.J. Employers*, NJ.com (Feb. 7, 2006), available at www.nj.com.

⁸⁰ *Id.*

⁸¹ Dillon, *supra*, note 56.

⁸² *Id.*

Litigation

On February 9, 2006, RILA filed federal lawsuits, against Maryland and against Suffolk County, New York.⁸³ In its filing, RILA is asking the federal judges to grant injunctions to prevent enforcement of the laws.⁸⁴ RILA argues that the laws are illegal under the Employee Retirement Income Security Act of 1974 (“ERISA”) and that state and local governments are not allowed to mandate levels of health care coverage by private companies.⁸⁵

In claiming that ERISA applies, RILA argues that ERISA preempts the Maryland law because it conflicts with the purpose of ERISA, to ensure that employer benefit plans are not subject to different legal obligations in various states.⁸⁶ Maryland counters by saying that the law is not preempted by ERISA and that the laws are not mandated health care laws because they do not mandate to employers what must be covered. Rather, the law provides an amount that must be spent, whether that be on the company’s employees through health care benefits or through a fee paid to the state health programs.⁸⁷

CONCLUSION

According to the latest government data, approximately 46 million Americans do not have health insurance.⁸⁸ Requiring large employers to pay health care costs for employees does not solve the health care crisis in the US.⁸⁹ In the early 1990s, big business was instrumental in ending the Clinton administration’s attempt at universal coverage.⁹⁰ In the absence of any national reform, states are attempting to find a balance; Maryland’s new law

⁸³ Rachel Brand, *Health Bill Takes Aim at Wal-Mart*, Rocky Mountain News (Feb. 9, 2006), available at www.rockymountainnews.com. On Oct. 28, 2005, Suffolk County Executive Steve Levy signed the “Suffolk Country Fair Share for Health Care Act” into law. This law requires that non-unionized, large retail grocery stores in Suffolk County make at least a \$3 per hour per employee health care expenditure and that all companies without health care benefit plans must establish one. *Retail Industry Leaders Association v. Suffolk County, et al.* (D. Md. Filed Feb. 7, 2006) available at www.retail-leaders.org.

⁸⁴ Brand, *supra*, note 83.

⁸⁵ *Id.*

⁸⁶ Legal Overview, *supra*, note 66.

⁸⁷ *Id.*

⁸⁸ Online NewsHour, *supra*, note 4.

⁸⁹ Michael Barbaro, *Wal-Mart Chief Makes Plea to States on Health Care Costs*, The New York Times (Feb. 27, 2006), available at www.nytimes.com. A Wal-Mart executive “said that state bills aimed at improving Wal-Mart’s benefits may score short-term political points, but they won’t solve America’s health care challenges.” *Id.*

⁹⁰ The Week, *supra*, note 26.

represents one such attempt.⁹¹ In the end, some economists point out that our economy does not generate enough jobs that support both a living wage and health benefits anymore, and that there is not much that can be done about the economy.⁹² One economist offers up the following solution: “Require everyone to cover themselves, create a market in which they can do so fairly, subsidize those who need help, and use information tools and better incentives to make our delivery system far more efficient.”⁹³ It is a tall order but one worth national discussion.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

