

## Despite NELF's Urging, the Supreme Court Declines to Review "Play or Pay" Laws as Threat to ERISA Plans

*The ERISA Industry Committee v. City of Seattle*, U.S. Supreme Court, No. 21-1019

This case challenged Seattle's "play or pay" ordinance, by which the city seeks to do an end-run around federal law. The federal Employee Retirement Income Security Act (ERISA) expressly pre-empts all state and local laws that relate to employer-offered benefit plans covered by the Act. This prohibition on non-federal laws minimizes the costs and inefficiencies that would arise if employers had to comply with a nationwide patchwork of local requirements.

State and local governments sometimes try to circumvent pre-emption by enacting "play or pay" laws. Here, the Seattle ordinance imposes on employers in the hotel business the choice of three ways to provide healthcare benefits to employees; two options assume an ERISA plan ("play"), but the third, i.e., making direct payments to the employees ("pay"), supposedly does not and supposedly does not relate to an ERISA plan, either.

The U.S. Court of Appeals for the Ninth Circuit upheld the ordinance, finding that ERISA did not pre-empt it because of the third option is supposedly unrelated to ERISA. That decision is one of many, both in ERISA cases and outside ERISA, in which a court adopts a presumption *against* pre-emption when a local law deals with a subject (such as health care) traditionally regulated locally under the state's police power. The use of the presumption was a key issue in this appeal because the extent of pre-emption is expressly written into ERISA. NELF filed an amicus brief urging the Court to review this recurrent misuse of the presumption.

In its brief NELF first cautioned that if the Seattle ordinance is not invalidated, it will become a model for other local governments to enact similar laws, thereby undermining Congress's goals of uniformity and cost-effectiveness in ERISA plans. Indeed, in an amicus brief filed below eight other cities have already proclaimed their eagerness to use the ordinance as a model. NELF pointed out that not only can the effects of the decision not be contained geographically, they also cannot be confined to the hotel industry. Moreover, proliferation of such costly local laws would come at an especially bad time for an economy battered by restrictive covid protocols. For that reason, local laws like the Seattle ordinance should not be imposed on businesses unless the Court has first pronounced authoritatively on their lawfulness. As NELF recalls to the Court, in the past, even in the absence a circuit split, it has not hesitated to grant certiorari in order to clarify the lawfulness of a state law under ERISA.

Turning its attention the presumption against pre-emption, NELF treated this important legal question at greater length than did other amici. NELF argued that the decision below erred when relying on the presumption against pre-emption because ERISA contains an *express* pre-emption requirement. There is therefore no need to presume anything. NELF notes that in the 1947 case in which the Supreme Court first acknowledged the presumption, it limited its examples of earlier uses to cases of *implied* pre-emption, a distinction that came to be forgotten in the course of time. Yet, confusingly, the Court has also continued to endorse the idea that the presumption has no place in a court's reasoning when pre-emption is express.

NELF cautioned that use of the presumption to supplement express pre-emption risks thwarting congressional intent; it also risks giving an excess, "double weight" to federalism. When the fact of pre-emption is expressly written into the law, as it is in ERISA, the scope of the pre-emption should then be determined by ordinary principles of textual interpretation applied to the actual words of the statute itself. Misuse of the presumption has grown so ingrained in many lower courts, NELF told the Court, that only the clearest statement of Court itself now can end it.

On November 21, 2022 the Court denied the petition.