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## U.S. law may hinder governor's health plan

By Marc Lifsher

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A federal law intended to allow companies to create a uniform system of health benefits across the country may stand in the way of Gov. **Arnold Schwarzenegger's** still-sketchy universal health plan.

The 1974 law sought to help employers avoid a spate of conflicting state laws – with different levels and types of worker benefits.

Last week a federal appeals court cited the law when it invalidated a Maryland law aimed at making Wal-Mart Stores Inc. spend more on healthcare. Since then, it has sparked questions about the governor's plan.

Wal-Mart and some other California businesses are among those skeptical of the plan. Any California health insurance law that contains a payroll tax could be challenged in federal court upon passage, they suggest.

The 1974 law's federal "preemption is a problem the governor has to look at," said Trudi Hughes, Wal-Mart's senior public affairs manager, based in Sacramento. "I would say that any sort of mandate is going to be suspect."

But the Schwarzenegger administration says no. It points out that the California plan would not be company-specific, nor would it mandate any specific kind of health benefit.

"We are on better ground," said John Ramey, a senior healthcare policy consultant for the administration.

The Schwarzenegger administration says its plan is different from Maryland's and should not be overruled by the 1974 federal law known as the Employee Retirement Income Security Act, or ERISA.

But **Mark Johnson**, a Grapevine, Texas-based attorney and a top national expert on ERISA, doesn't expect the Schwarzenegger payroll tax to survive a court challenge should it become law.

"This would be a direct attempt to manage a plan. I don't think it would pass muster," he said in a telephone interview.

The governor's plan would spend \$12 billion annually in combined state, federal and private-sector funds to provide basic health coverage for 6.5 million uninsured Californians.

The proposal would require all individuals to have coverage, and it would provide subsidies for the poor.

All employers with more than 10 workers would be required to offer insurance or pay the equivalent of 4% of their payroll into a state fund. Hospitals and doctors would also be taxed as part of a so-called shared-responsibility scheme.

The Maryland law, the Fair Share Health Care Fund Act, originally set to take effect Jan. 1, was written to apply to employers with more than 10,000 workers in the state. The wording had the result of applying to just one company, Wal-Mart.

A nearly identical bill passed by the California Legislature last year was vetoed by Schwarzenegger.

"Singling out large employers and requiring them to spend an arbitrary amount on healthcare does nothing to lower costs or guarantee that even one more person has healthcare coverage," the governor wrote in his veto message Sept. 13.

Wal-Mart's Hughes said she hoped that the effect of the ruling by a three-judge panel of the U.S. 4th Circuit Court of Appeals, which is binding only in Maryland, Virginia, North Carolina, South Carolina and West Virginia, would spread to other states or local governments trying to find ways to cover millions of uninsured citizens.

Currently, she said, the city of San Francisco has one such law, which is being challenged by the Golden Gate Restaurant Assn.

The appellate panel – in a 2-1 ruling upholding a lower court decision – did not like piecemeal efforts to regulate company health benefits. "This is precisely the regulatory Balkanization that Congress sought to avoid by enacting ERISA's preemption provision," the majority said.

The Maryland law "directly regulates employers' provision of healthcare benefits" and is "preempted by ERISA," the opinion said.

The Maryland attorney general's office has not decided whether to take the case to the full 4th Circuit. A decision to

do so is likely to borrow arguments from the court's minority opinion.

The dissenting judge noted that "Maryland is being buffeted by escalating" health insurance costs. Giving Wal-Mart or other employers the option of either providing insurance or paying into a state fund does not force companies to provide specific healthcare benefits, he said.

California, likewise, would not impose any specific insurance benefits scheme on companies, said Kim Belshe, the governor's secretary of Health and Human Services. Rather, "what distinguishes the governor's proposal is the principle of shared responsibility" spread among businesses, individuals and government, she said.

Whatever the governor eventually comes up with – and whether he calls it a tax or a fee – could wind up becoming the target of a lawsuit, said Allan Zaremborg, president of the California Chamber of Commerce.

Business groups such as Wal-Mart could challenge any proposed healthcare benefit mandate under the federal law. For their part, Republican lawmakers and anti-tax activists are likely to sue if the payroll levy does not receive what they contend is a constitutionally required two-thirds vote in the state Legislature.

"This is the dilemma that any solution faces in California," Zaremborg said.

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