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Graham Cassidy § 105 would repeal the ACA "employer mandate". Although its sponsors claim that the bill will give states a great deal of flexibility, it will do nothing to help states ensure that employers provide their employees with decent health insurance; quite the reverse. It will also give employers the freedom to ignore the popular ACA requirement that allows children up to age 26 to receive coverage through their parent' plans, at least when their parents get health insurance from their employers. Here's why.

The Affordable Care Act (ACA) was designed to foster and build on health insurance plans that employers in the US provide to their employees. With limited exceptions such as provisions about wellness plans, it left in place the Employee Retirement Income Security Act of 1974 (ERISA), the federal statute that governs benefits that employers offer their employees. Rather than amending ERISA to place new federal requirements on employer-provided plans, ACA imposed a tax penalty (called a "shared responsibility payment") on employers (with at least 50 full-time equivalent employees) with employees who receive tax credits for purchasing insurance through the ACA exchanges. This is the ACA "employer mandate," aimed to deter employers from dumping their existing health care plans. It is the ACA provision that supported the mantra: "you'll get to keep the insurance you have." This mandate is imposed through a tax and otherwise leaves in place the regulatory vacuum created by ERISA. Let me explain how.

ERISA, enacted in 1974, is the federal statute that governs employee "welfare" plans: benefits, including health benefits, that employers offer their employees. Although ERISA imposes quite substantial requirements on pension plans, it imposes only disclosure and fiduciary responsibilities on welfare plans. Employers must state clearly for their employees what they are given—but may also reserve the right to change plans, as long as they tell their employees that they might do this. Employers also must manage their plans as a good fiduciary would, but this does not mean that employers must offer minimum benefits to their employees, or indeed any benefits at all.

At the same time, Section 514 of ERISA, 29 U.S.C., provides that ERISA preempts state laws insofar as they relate to employee welfare plans. This preemption provision "saves" state regulation of insurance but does not “deem” employers who self-insure to be providing insurance. Most large employers self-insure, maintaining their own reserves and contracting with entities who offer insurance to manage their plans. This means that self-insuring employers are not subject to any state efforts to mandate benefits. A state law providing that employers must allow employees to keep their children under age 26 on their plans would be preempted for self-insuring employers. So would a state regulation that requires employers to provide their employees with plans that offered minimum essential benefits. Insurance plans offered for purchase in the state would, however, be subject to these state regulations. But even for these plans, ERISA presents a barrier for employees. For any welfare plan, including insurance bought by an employer for employees, ERISA preempts state law remedies. Instead, it limits employees to ERISA remedies—roughly, their benefits under the plan. State efforts to impose tort liability on employer plans, such as for negligent denial of claims or for bad faith, are preempted. The Texas statute that imposed a tort damages remedy on HMO claims denials that failed to meet a standard of ordinary care was preempted in this way.

If Graham-Cassidy passes, the federal pressure for employers to provide health insurance will vanish. ERISA preemption, in all its glory, will remain. ERISA will continue to require employers to tell their employees what they are—or are not—getting. And it will continue to require employers to exercise appropriate fiduciary duties. But it will also continue to block states from imposing coverage mandates on employers who self-insure. And it will continue to block employees from getting damages that are caused by negligent denial of coverage.

This is the 5th Anniversary of the Bill of Health. Bill of Health is to be celebrated for at least one—but only one—very informative post about ERISA: Allison K. Hoffman’s useful discussion last June. ERISA, however, tends to be off the radar screen for many interested in health law and health policy. They may be reminded all too soon that this is a serious mistake.

Employees and your children under 26: beware of Graham Cassidy.

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About Leslie Francis

I'm Alfred C. Emery Distinguished Professor of Law and Distinguished Professor of Philosophy at the University of Utah. My chief interests these days are privacy and confidentiality, justice in health care, disability and anti-discrimination more generally.

Most recently, John Francis and I have published Privacy: What Everyone Needs to Know (New York: Oxford).

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