

August XX, 2023

The Honorable Bernie Sanders
Chairman, U.S. Senate Committee on
Health, Education, Labor, and Pensions
428 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Bill Cassidy, M.D.
Ranking Member, U.S. Senate Committee on
Health, Education, Labor, and Pensions
455 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Members of U.S. Senate
Committee on Health, Education, Labor, and
Pensions
428 Dirksen Senate Office Building
Washington, DC 20510

Subject: Protect ERISA Preemption and Preserve Uniform Benefits for Self-insured Health and Welfare Plans

Dear Chairman Sanders, Ranking Member Cassidy, and Honorable Members of the Senate HELP Committee:

The undersigned members and allies of the National Coalition on Benefits (NCB), are writing to collectively express our urgent concern and strong opposition to any measures, provisions, commentary or other actions in legislation or during the legislative process that would directly or indirectly curtail, restrict or otherwise diminish the original intent of the ERISA preemption provisions. NCB is a group of businesses and associations representing an employer community that provide extensive ERISA-governed employee benefit plans and programs, including health and welfare benefits, to millions of American families. Among its fundamental aims, NCB is committed to protecting the ability of employers to provide uniform, equitable, and affordable health benefits to employees and their families across the country.

We are aware of efforts and requests to apply or imply a “carve out,” “status quo,” or other type of statement or provision regarding ERISA preemption in the context of federal pharmacy benefit manager (PBM)-related legislation currently under consideration. We unequivocally oppose these efforts, regardless of how innocuous or limited any such statement or provision is characterized, because of the damage it would inflict on the U.S. system of private-market employer-sponsored benefit programs. **We strongly believe that adopting or expressing any intention to allow otherwise preempted state policies to apply directly or indirectly to self-funded plans, or worse, to create an express carve out or “non-preemption,” would be catastrophic for ERISA-governed self-insured health plans and could potentially have destructive impacts on ERISA-governed retirement plans as well.**

We understand that some groups have sought to characterize certain current state-law activity as protected by the Supreme Court’s holding in *Rutledge v. PCMA*. Such characterizations are incorrect and misplaced. The Court’s decision in *Rutledge* was narrow in finding that ERISA does

not preempt a state law that results in indirect, non-acute price regulation of an ERISA plan. While it is a case that helps define the contours of preemption; it is not a sweeping change to long-standing ERISA preemption precedent and should not be read as such. It is essential that self-insured health and welfare plans retain the ability to design and provide uniform, valued benefits to their employees without any encumbrances from state laws that are otherwise preempted by ERISA. Such preemption is the underpinning of the country's system of private, self-insured, employer-provided health coverage.

ERISA and its preemption provisions have been instrumental in establishing a consistent and reliable statutory and regulatory framework that enables plan sponsors to design and uniformly administer health, welfare, and retirement benefits for employees located in multiple states. Self-insured ERISA health and welfare plans should remain able to solely follow federal statutes and regulations as has been the case, successfully, under ERISA for nearly 50 years. While states should have the freedom to adopt policies for insured coverage in their state (and other permitted purposes), it is crucial to ensure that such state policies, statutes, and regulations do not impede the ability of ERISA-governed self-insured health and welfare plans to function in a uniform manner nationally. These employer-sponsored self-insured health plans must continue to avoid the "patchwork" and quagmire of state-by-state laws or rules that directly or indirectly implicate plan design and administration to be able to continue to offer comprehensive, affordable, uniform health and welfare coverage to their employees equitably across their entire workforce.

Employer-sponsored self-insured health plans offer numerous advantages to enable efficient, equitable, and effective healthcare coverage for employees. These plans provide cost savings, flexibility for generous plan designs, and the ability to offer consistent benefits to employees and their families across the country. Preserving ERISA preemption empowers employers to continue to focus on promoting the health and well-being of their workforce, and attracting and retaining employees. Preemption is fundamental to ERISA working as intended. Nearly 50 years ago, one of ERISA's authors, Representative John Dent, identified the preemption provision to be the law's "crowning achievement" because without it, the legislation would not have enjoyed the support of both labor and management since it is so fundamental to the ability of multi-state employers to sponsor benefit plans to workers nationwide.

We understand that each state may seek to apply its own requirements that directly and indirectly impact insured health coverage in varied and, across the states, even contradictory ways. We acknowledge that individual state prerogatives are within their purview as they relate to insured health plans. However, it is imperative not to misstep and undermine the long-standing principles of ERISA and the self-insured employer health plans and employees it serves to protect.

As a coalition, we urge you to protect ERISA preemption as the bedrock foundation for the successful provision of private-market self-insured health coverage to employees and their families. We further urge you to avoid and eschew any proposals that may directly or indirectly

undermine ERISA preemption. Even proposals that may seem innocuous, targeted, or well-intended would set a dangerous precedent and be devastating for self-insured employer health plans and employers' ability to continue to offer comprehensive, uniform, affordable health coverage to millions of American families.

Thank you for your attention to this matter. We would be happy to engage further, provide any additional information that may be helpful, and otherwise support you in protecting the viability and delivery of self-insured health plan benefits.

Sincerely,

CONFIDENTIAL for Review and Sign-On