THE ERISA INDUSTRY COMMITTEE
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STATEMENT FOR THE RECORD BY

THE ERISA INDUSTRY COMMITTEE

TO THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

HEARING ON

"IMPROVING RETIREMENT SECURITY AND ACCESS TO MENTAL HEALTH BENEFITS"

March 1, 2022

Chairman DeSaulnier, Ranking Member Allen, and Members of the HELP Subcommittee, thank you for the opportunity to submit a statement for the record on behalf of The ERISA Industry Committee (ERIC) on improving retirement security and access to mental health benefits. ERIC is the only organization advocating exclusively for large employer plan sponsors that provide health, retirement, paid leave, and other benefits to their nationwide workforces on the federal, state, and local levels.

Americans engage with ERIC member companies many times a day, such as when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, go shopping, or use cosmetics. ERIC's members are leaders in every industry sector and provide comprehensive benefits to tens of millions of active and retired workers and their families across the country.

ERIC member companies offer great health and retirement benefits to attract and retain employees, improve health and financial wellbeing, prepare employees for retirement, and provide peace of mind. Employers like ERIC members roll up their sleeves to improve how health care is delivered in communities across the country and promote retirement savings. To support these efforts, ERIC advocates on the federal, state, and local levels for policies that help large employers provide benefits efficiently and effectively. Some of these policies are described below.

IMPROVING RETIREMENT SECURITY

Large plan sponsors invest in their employees and their financial wellness, including retirement security. ERIC's member companies have different workforces and benefits designs, but employers, workers, and retirees can all gain from a retirement system bolstered by policy enhancements. Sometimes, federal rules get in the way of the flexibility that forward-thinking employers need to offer helpful options to their workers.

At other times, arcane rules can inadvertently harm both workers and job creators by unnecessarily increasing costs and administrative burdens, creating inefficiencies, and reducing opportunities. This Subcommittee can play a critical role in promoting policies that reduce barriers and increase opportunities to enable workers to make the most from their retirement savings.

ERIC appreciates the leadership of the Members of the Education and Labor Committee in tackling these challenges in a bipartisan way. For example, in November, the Committee unanimously reported the *Retirement Improvement and Savings Enhancement Act* introduced by Subcommittee Chairman DeSaulnier and Subcommittee Ranking Member Allen, and Full Committee Chairman Scott and Ranking Member Foxx. As Congress continues to refine legislative proposals to enhance the private-sector retirement system, ERIC has the following recommendations:

- <u>Maintain electronic disclosure as an option for default distribution</u>

    - A 2020 Department of Labor (DOL) regulation permitted plan sponsors to provide electronic delivery as the default option for providing retirement plan notices, provided certain conditions were met. This regulation eased administrative burdens and allowed plans to offer notices and information more quickly and usefully (for example, by embedding internet links to provide beneficiaries useful and targeted information). The regulation included substantial safeguards, including a requirement that participants have internet access and the ability for participants to opt out any time. These protections were specifically recognized by the DOL in a report required by the *Consolidated Appropriations Act of 2021*. According to the DOL report, the 2020 regulation "is unlikely to have any negative impact" on rural residents and seniors, but the regulation is critical to reducing administrative burdens that make providing retirement benefits more costly.

- <u>Do not impose burdensome new administrative requirements</u>

    - Retirement policy changes should not make retirement plans more costly and less flexible. Policymakers should carefully scrutinize proposals that would increase administrative requirements for defined contribution plans, make it harder for defined benefit pension plan sponsors to manage their risk, or require plans to provide costly, one-size-fits-all written disclosures. New burdens on employers should always be subject to cost and benefit analysis.

- Simplify reporting and disclosure requirements by eliminating redundant and unnecessary disclosures

    - The Tax Code and ERISA include many rules requiring and governing the reports, disclosures, and notices that employers and qualified plans must provide to employees and participants. We believe that these communications are complex, burdensome, and costly -- and are less informative or effective for employees and participants than they should be. ERIC supports proposals that direct the DOL, Treasury, and the Pension Benefit Guaranty Corporation (PBGC) to issue regulations to consolidate and simplify the existing ERISA and tax reports, notices, disclosures, and other information relating to retirement plans.

- Expand the ability of plans to self-correct plan errors

    - Plan sponsors and administrators should be permitted to play a more significant role in identifying and correcting plan errors, including excess, insufficient, and missed contributions, compensation and services, accrued benefits, and other determinations and calculations. In particular, employers should be allowed more opportunities to self-correct routine, common operational, and plan document mistakes without incurring fees and federal agency oversight and approval. Expanding the Employee Plans Compliance Resolution System (EPCRS) and the Voluntary Fiduciary Correction Program (VFCP) would increase compliance and reduce the cost of plan administration without adversely affecting participants' benefits.

- Affirm the fiduciary responsibility to optimize financial outcomes for plan participants

    - ERISA's duties of prudence and loyalty require plan fiduciaries to operate for the exclusive purpose of providing benefits and defraying expenses. Many factors are relevant when ensuring the best possible financial outcome for plan participants and beneficiaries. ERIC supports the Department of Labor's longstanding policy that plan fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral, social policy goals.

- Strengthen voluntary retiree health care and life insurance benefits by continuing to permit overfunded pension plans to fund them

    - Section 420 of the Internal Revenue Code allows employers with generously overfunded pension plans to use a portion of surplus assets to fund retiree welfare benefits (health care benefits and group life insurance coverage) without jeopardizing the security of the underlying pension promise. This bipartisan policy was initially enacted in 1990 on a temporary basis, and the current extension is set to expire at the end of 2025. Many defined benefit plans have managed fixed income assets to meet pension liability timing, reducing risk, and the need for excess assets while ensuring pension obligations are met. ERIC urges Congress to modernize the surplus asset rules to allow for small transfers with a reduced overfunding threshold and extend the measure well in advance of 2025.

- <u>Provide a safe harbor for the recovery of retirement plan overpayments</u>
  - Plan sponsors have a fiduciary obligation to ensure that retirement plans are adequately funded and that every participant receives the benefits that have been promised. However, many plan sponsors do not want to burden retirees with paying back often small amounts that were mistakenly overpaid. ERIC supports legislation that would provide a safe harbor to allow plans to forego recouping these overpayments that were not the fault of the retiree.

- <u>Create a searchable Retirement Savings Lost and Found</u>
  - Retirement plans of ERIC's member companies tend to be large and complex, some with significant acquisition histories that could span decades. As a result, these plans are more susceptible to difficulties finding plan participants despite significant and consistent efforts. ERIC supports creating a federal "Lost and Found" searchable database of retirement accounts to help participants find former employers and determine whether they could be receiving distributions. With data security safeguards, such a database would help participants receive earned benefits and decrease the number of missing participants.

- <u>Modernize the definition of a Highly Compensated Employee to reflect salaries in the modern skilled workforce</u>
  - The IRS has complicated rules to ensure that employee benefit plans do not disproportionately benefit "highly compensated employees" (HCEs), intended for decision-makers regarding those same benefit plans. But the HCE definition no longer reflects the salary trend realities of some highly skilled industries or high-cost regions. As a result, junior employees can face limitations on the contributions they can make or receive under a 401(k) plan. Modernizing the HCE definition by allowing an employer to limit its HCEs to the top-paid 10 percent workers (rather than the top 20 percent under current rules) would help ensure that more junior employees are not excluded from savings opportunities.

- Stop unnecessary and harmful PBGC premium increases
    - The PBGC's 2021 Annual Report shows that its single-employer program is overfunded by $30.9 billion. ERIC urges Congress to correct arcane budget scoring rules that perversely incentivize using premium increases to offset spending proposals completely unrelated to the retirement system. Additionally, past increases have caused many employers to leave the system, reducing the PBGC's premium base. ERIC supports prohibiting premium increases from being used as a funding offset in the future and calls on Congress to prevent further increases and consider lowering the current level of premiums in light of the PBGC's improved financial status.
- Allow workers to access retirement savings in a personal emergency
    - Short-term financial needs and risks create significant financial stress for employees, undermine their productivity, and interfere with their retirement savings. It is crucial to recognize the holistic and lifetime nature of financial well-being (including retirement) and strengthen the connections between short-term financial concerns and adequate savings for retirement. ERIC supports permitting retirement savers to access up to $1,000 from a retirement savings account for personal emergencies, subject to some conditions. Allowing participants access to savings for emergencies will encourage their participation in retirement programs – particularly for those who may be hesitant to "lock away" money in case they will need it later.
- Defend ERISA preemption against efforts to regulate retirement plans at the state level
    - The ability of large employers to follow a single set of federal rules is critical to their ability to provide benefits to their workers, families, and retirees located across the country. ERIC has been vigilant in protecting ERISA preemption and urges Congress to continue to ensure that employers who voluntarily provide retirement benefits can do so on a uniform basis.

Some of these provisions have already been included in bipartisan proposals, such as the *Retirement Improvement and Savings Enhancement Act*, the *Securing a Strong Retirement Act of 2021* introduced by Congressmen Neal and Brady, and the *Retirement Security and Savings Act of 2021* introduced by Senators Cardin and Portman. ERIC applauds congressional leaders for recognizing the continued need to focus on retirement security.

IMPROVING ACCESS TO MENTAL HEALTH BENEFITS

ERIC is committed to helping employers provide quality, affordable, high-value health coverage to employees, their families, and retirees. Our member companies are passionate about improving mental and behavioral health offerings and coverage and continue to go above and beyond to provide their employees and families tools and benefits to improve their physical and mental wellbeing. We believe that it is time for the government to support employers in this effort.

Specifically, we call for clear-cut, comprehensive guidance that helps employers support their workforce and requires mental health providers to support patients over their bottom line.
We are deeply troubled by DOL's recommendation encouraging Congress to authorize the agency to assess civil monetary penalties for parity violations, as mentioned in their 2022 Mental Health Parity and Addiction Equity Act (MHPAEA) Report. Penalties are not the answer. Rather, what is needed is regulatory guidance that ensures that mental health providers put patients first. And which allows employers to support their workforce and families.

Large employers have made available the newly required comparative analyses upon request from DOL. However, despite extensive good faith efforts to comply, our member companies have reported that upon submitting analyses, DOL staff sent back dozens of questions and requests for substantially more documentation without explanation of what changes employers can make to comply with parity rules. DOL has defied Congress, refusing to abide by the *21st Century Cures Act* requirements, which mandated the agency to provide comprehensive guidance to employers on how to comply with parity rules, including positive and allowable examples of non-quantitative treatment limitations (NQTLs). DOL's recent report included several suggestions that we urge Congress to consider, including a more systemic approach to compliance and expanding telehealth. However, DOL's recommendation of issuing civil monetary penalties will not help patients receive the care they need when they need it.

Meanwhile, employers are proposing positive solutions. ERIC developed a comprehensive set of recommendations in our report, "*Prioritizing Employee Mental Health: Solutions for Congress*". These recommendations are 100 percent focused on improving patient access, making care more affordable, and driving value in the mental and behavioral health system. Some of our recommendations include:

- Allowing mental health providers to practice across state lines
    - ERIC believes that Congress can act to quickly to provide patients with access to needed care by permitting ERISA plans to facilitate telehealth between a willing patient and a willing provider, so long as that provider holds a current license in a state in which the plan operates and is affiliated with a network associated with the plan sponsor, their carriers, and vendors.

Allowing mental health providers to practice across state lines is a direct and simple approach that would instantly solve a huge access problem, especially as it pertains to mental and behavioral health, for patients in self-insured plans.

- <u>Expanding telehealth benefits to ALL employees in two critical ways</u>

    - We urge Congress to act before the end of the public health emergency to ensure that standalone telehealth programs can remain in place and to allow employers to offer the benefit to more workers. If permitted to offer the benefit to those who are unenrolled rather than just those who are ineligible, employers could expand telehealth benefits to more beneficiary cohorts – especially benefitting younger workers and those of less economic means. Additionally, we urge Congress to allow 1st-dollar coverage of telehealth so that workers in these plans can receive the care they need. Millions of Americans have currently lost the benefit to cost-free access to a telehealth visit and are paying the full "fair market value" of care, until they have paid their entire plan deductibles. This would be a barrier to care, and Congress should enact the "*Primary and Virtual Care Affordability Act*" (H.R. 5541) so Americans can have better health care access.

- <u>Incentivizing providers into mental health practice with tuition reimbursement and funding</u>

    - ERIC member companies continue to believe that some of the most important steps Congress can take to address access to mental and behavioral health include facilitating more providers in the field, equipping more providers in other fields (such as primary care doctors or nurse practitioners) to take on mental health roles, and encouraging more coordination between care teams. ERIC's member companies have explored a number of options Congress could consider in this space. One option would be to specifically target programs like Graduate Medical Education at mental and behavioral health providers, and to promote programs aimed at assisting providers entering into the mental health field (such as perinatal or reproductive psychiatry fellowships).

- <u>Ensuring provider directories indicate whether a provider is accepting new patients</u>

    - With the passage of the *Consolidated Appropriations Act* in December 2020, Congress has now set in motion a requirement that provider directories offered by health plans to participants will be accurate and up to date. However, a patient will still not be able to determine whether a particular doctor is accepting new patients at a given time. The problems created by this are obvious – worst of which could be a patient actually foregoing care due to frustration with getting turned away by providers.

Congress should ensure that insurers have an easy way for providers to "toggle" whether or not they are accepting new patients – and requiring providers to do so. It may not sound like a significant policy change, but for millions of Americans who are leery of seeing a long list of providers who turn them away when they call, this could be the difference in obtaining care or not.

- Improving coordination of care to end the system's current siloed nature

    - Employers know it is imperative to continue focusing on the transition to coordinated care. We have learned that "scope of practice" laws sometimes hinder the ability of various medical providers (a prime example being nurse practitioners) from meeting unmet mental and behavioral health needs. It has also become clear that a lack of fully interoperable electronic medical records (EMRs) is making it harder for providers and facilities to coordinate. We are interested in how coverage rules may be applied or expanded in order to encourage and facilitate behavioral health options, such as attending group meetings or therapy sessions. While programs such as "Narcotics Anonymous" do not generally constitute medical care, attendance at meetings or the like could well be a part of an individual's behavioral health regimen, and disruption of that regimen could be seriously deleterious to the patient's health.

- Publishing provider quality and safety data to drive better patient outcomes

    - Plan sponsors work to ensure that beneficiaries have access to quality care – and this includes building networks that eschew dangerous, ineffective providers and facilities. Unfortunately, too often a plan sponsor lacks critical information needed to make such a determination. Congress should consider taking steps to alleviate the information gap, which is especially pertinent in the mental and behavioral health space. ERIC member companies and our organizational partners have suggested a number of potential ways to improve the availability of quality information. For instance, the Centers for Medicare and Medicaid Services (CMS) could expand the availability of quality ratings, and the Centers for Disease Control and Prevention's National Healthcare Safety Network could collect and report uniform patient safety data from different sites of care. Congress could also direct the Patient-Centered Outcomes Research Institute to prioritize research on mental health, or direct CMS' Center for Medicare and Medicaid Innovation (CMMI) to experiment with Centers of Excellence programs, modeled off successful efforts in employer-sponsored coverage.

- Modernizing rules for health care accounts to better support patients and lower costs

    - Rules related to account-based health benefits are currently far from optimized to encourage and empower patients to access mental and behavioral health when they need it. ERIC member companies have suggested several changes Congress should consider to maximize the ability and the likelihood that patients will seek out and obtain the care they need. One option is to update high deductible health plan (HDHP) rules to allow plan beneficiaries to access subsidized care at worksite health centers, which are a critical access point for primary care. Congress could also give HDHP sponsors flexibility to provide a limited amount of 1st-dollar coverage for high-value services, since employers have learned that outcomes can be significantly improved when barriers are removed from high-value care. Similarly, policy could be updated to allow the coordination of capitated benefit models (like Direct Primary Care) with HDHPs. Or Congress could consider permitting funds in dependent care flexible spending arrangements (DCFSAs) to be used to pay a broader definition of "caregivers," including family and friends, as the COVID19 pandemic has shown employers that plan beneficiaries often sought help from those closest to them.

- Reducing red tape to encourage employers to innovate better mental and behavioral health benefits

    - Congress should consider allowing the creation of limited mental health programs that could be flexible, without being considered "group health plans." If these programs were designated not to create an employer-employee relationship, they could potentially be offered to independent contractors and gig economy workers. To encourage innovation in benefits subject to MHPAEA, Congress could consider authorizing "compliance certification" entities, who ERISA fiduciaries could rely on to evaluate group health plans for parity compliance. And reducing or digitizing many of the notice and disclosure requirements on plan sponsors would also help free up funds and bandwidth to innovate.

- Create a blue-ribbon panel to focus on the mental and behavioral health aspects of the COVID pandemic, to better plan for the future

    - In 2020, for the first time in recorded history, countless Americans were asked to work from home, limit contact with the outside world, refrain from "elective" medical care, and much more. Every day we learn more about the consequences of the policy decisions made in order to combat the COVID-19 pandemic. It is imperative that the federal government develop a comprehensive categorization of "lessons learned" to determine what could be done better.

To create a needed roadmap, Congress should direct an objective body to suggest how we can better prepare and eliminate said problems should such a disaster ever befall the country again. The roadmap should place a special emphasis on protecting Americans' health, both mental and physical, and providing the needed behavioral health support for individuals who may suffer from substance use disorders.

- Speed the transition to value-based payments to improve care and save patients money

    - The federal government has an unparalleled ability to transform the entire health care system by leveraging the tens of millions of covered lives enrolled in federal health programs. Various employers, in concert or individually, have worked for decades to transition from fee-for-service to a value-driven system. However, it will be impossible to fully make that transition without federal leadership. While good work has already been done by CMS and CMMI, there is more work to do, and a huge opportunity as it pertains to mental and behavioral health. Demonstrations or nationwide programs could be launched to transition away from fee-for-service in the area of mental health, potentially in partnership with employers and private-sector initiatives. We hope that such efforts could include realigning payments to encourage the highest-value treatments, medications, and services, and ensuring that patient-reported outcomes measures are central to these efforts.

CONCLUSION

Thank you for the opportunity to share the perspective of large plan sponsors on these important employee benefits issues. We encourage members of the Subcommittee to consider these recommendations and the critical roles that employers play in promoting retirement security and advancing health care quality and affordability. ERIC and our member companies look forward to continuing to discuss these issues and our proposed solutions with Members and staff.