THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

DILLON CLAIR
Director, State Advocacy

March 5, 2025

Chair Lois W. Kolkhorst
Texas Senate
Committee on Health & Human Services
Sam Houston Building, Room 420
201 E. 14th St.
Austin, TX 78711
Submitted Electronically

**Re: Public Comments from The ERISA Industry Committee – ERISA Preemption Concerns Raised by SB 1122 – Applicability of State Insurance Code Subchapters to ERISA Self-Funded Health Plans**

Dear Chair Kolkhorst and Members of the Texas Senate Committee on Health and Human Services:

The ERISA Industry Committee ("ERIC") appreciates the opportunity to submit comments on the proposed legislation contained in SB 1122 being considered by the Texas Senate Committee on Health and Human Services ("Committee") during today's hearing. While ERIC recognizes the growing interest among state lawmakers in regulating the practices of pharmacy benefit managers ("PBMs"), we are deeply concerned by state policies, such as those proposed by SB 1122, that would impact the design and administration of self-funded health benefit plans governed by the federal Employee Retirement Income Security Act of 1974 ("ERISA").

Specifically, we believe that the intended application of two existing state insurance laws, INS § 1369.551-1369.555 ("Subchapter L") and INS § 1369.601-1369.610 ("Subchapter M"), to ERISA self-funded plans would overstep state authority to regulate these plans, create immediate conflicts with federal law, and lead to costly litigation if advanced. **To prevent this counterproductive conflict, ERIC strongly urges the Committee to consider the critical ERISA preemption issues raised by SB 1122 and vote to oppose the legislation.**

ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state and city across the country.

Large employers like ERIC member companies have long been at the forefront of innovating health care benefit design and administration trends. Their ability to do so depends in

large part on the protections offered by ERISA preemption. ERISA allows for a single set of standards for multistate employers to design and administer uniform health care and retirement benefits to their nationwide employees, regardless of where they live or work. Since ERISA's enactment, multistate employers have done just that, securing truly effective and efficient health care coverage enjoyed today by millions of Americans.

Importantly, SB 1122 directly follows a request for opinion submitted to Attorney General Ken Paxton last year regarding the applicability and enforceability of Subchapter L and Subchapter M to ERISA self-funded plans. ERIC provided public comments to help inform the response to this request, outlining the extent to which federal law limits state regulation of ERISA plans as well as the overt impact the Subchapters in question would have on plan design and administration if applied to ERISA plans. ERIC's comments also highlighted the high likelihood that one or several legal challenges would emerge to challenge application of these state laws to ERISA self-funded plans in the future.

Along this line, we believe that the Attorney General's legal opinion released last month in answer to the request features an interpretation of ERISA preemption principles that depart from, and conflict with, U.S. Supreme Court precedent as well as related Circuit Court decisions in this space. ERIC's following comments build upon previous arguments made to the Attorney General's office and outline our position that application of these Subchapters to ERISA self-funded plans is preempted by federal law.

**ERISA prohibits states from controlling the design and administration of self-funded plans established under ERISA**

ERISA was implicitly constructed by Congress with the objective of establishing nationally uniform rules for the design and administration of employee benefit programs. To uphold this national uniformity, Congress built into Section 514 of ERISA an extremely strong preemption clause stating that "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan". Over the 50 years since ERISA's enactment, the U.S. Supreme Court has interpreted this preemption clause very broadly to supersede state laws that either: 1) refer explicitly to ERISA plans, or 2) have a substantial financial or administrative impact on them, including regulating the provider networks that plans may use.

Essentially, state policies conflict with ERISA to the extent that they limit the design and administrative options available to plan issuers when applied to ERISA plans. To state plainly, ERISA prohibits states from controlling self-funded ERISA plans, even if that control is exerted indirectly via regulation of the third-party administrators or PBMs that administer those ERISA plans.

While the U.S. Supreme Court has established precedent in the case of *Rutledge v. PCMA*, 141 S.Ct. 474 (2020) allowing states to regulate the narrow issue of PBM payment

calculations to pharmacies, that authority is narrowly limited to a "state law that merely increases costs." Unlike the state law at issue in *Rutledge*, both Subchapter L and Subchapter M have a more direct impact on and relation to core elements of plan design and administration.

Most recently, the United States Court of Appeals for the Tenth Circuit applied the logic of *Rutledge* to the case of *PCMA v. Mulready*, No. 22-6074 (10th Cir. 2023), holding that several aspects of an expansive Oklahoma law that sought to regulate a broad range of PBM network practices were preempted by ERISA. The Court found that these aspects of the state's PBM regulation overstepped state authority and impermissibly controlled the design and administration of self-funded ERISA plans.

As the Court stated, "Our role is to answer whether the Act's four challenged provisions veer into the regulatory lanes that Congress has reserved for itself … we conclude that they do. Though the Act avoids mentioning ERISA plans … by name, it encompasses these plans by striking at the heart of network and benefit design." Importantly, several of the challenged Oklahoma provisions bear a striking resemblance to the provisions and requirements established by Subchapter L and Subchapter M.

**Subchapter L and Subchapter M feature policy provisions that would overstep state authority to regulate ERISA self-funded plans if applied to those plans by SB 1122**

Though Subchapter L and Subchapter M have not been enforced against self-funded ERISA plans in the years since their enactment, ERIC believes that attempting to apply their requirements to these plans now or in the future would cause direct and immediate ERISA preemption conflicts.

While large portions of Subchapter M are aimed at protecting claim payment amounts and pharmacy reimbursement, other provisions dictate the network standards and practices that both plan issuers and their administering PBMs are forced to adopt. Namely, the law features an extremely broad "any willing pharmacy" provision that prohibits plan issuers and PBMs from forming contracts that apply pharmacy accreditation standards "inconsistent with, more stringent than, or in addition to federal and state requirements," while making it nearly impossible for a plan issuer or PBM to terminate or refuse to renew a pharmacy contract without facing a presumption of retaliation. If applied to self-funded ERISA plans, the provisions of Subchapter M would effectively strip plans of their ability to design or operate any kind of distinct provider network, regardless of that network's effect on prescription drug costs for plan participants. As legal precedent surrounding ERISA has made clear, such a blanket usurpation of network design and administration choices by the state would be preempted if applied to or enforced against self-funded ERISA plans, either directly or indirectly through plan vendors.

Additionally, Subchapter L prohibits the use or transfer of identifiable prescription information and patient records to affiliate pharmacies for "commercial use". While this policy may be intended to prevent PBMs from steering patients to their own pharmacies, it takes an

overly broad approach to accomplishing this and would greatly restrict the ability of plan sponsors to freely communicate pertinent information that could lead to improved quality or reduced cost of treatment. This ability is a core aspect of plan administration. To the extent Subchapter L would strip this ability from plan issuers if enforced against ERISA self-funded plans, it would also be preempted by federal law.

**Conclusion**

ERIC appreciates the opportunity to provide comments on the policy proposal laid out by SB 1122 as well as the critical ERISA preemption concerns raised by this legislation. While we share Texas lawmakers' goal of reducing health care costs, policies that stand to erode ERISA preemption and national benefits uniformity threaten to do more harm than good. Therefore, to uphold ERISA preemption and protect the ability of multistate employer plan sponsors to effectively offer health benefits plans to millions of Americans, **ERIC strongly urges the Committee to oppose application of Subchapter L and Subchapter M to ERISA self-funded plans and vote against SB 1122.**

If you have any questions concerning our comments or ERISA preemption precedent, please contact us at (202) 789-1400 or dclair@eric.org.

Sincerely,

Dillon Clair

Dillon Clair
Director, State Advocacy