



March 27, 2025

Senator Jeff Barta
Chairman
Senate Industry and Business Committee
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

RE: North Dakota House Bill 1584

Dear Chairman Barta:

The American Benefits Council ("the Council") is writing with respect to North Dakota House Bill 1584, currently under consideration by the Committee on Industry and Business ("the Committee"). While the Council greatly appreciates efforts to reign-in prescription drug costs for employers and participants, we want to bring to your attention that H.B. 1584 includes numerous provisions that present significant issues under the federal Employee Retirement Income Security Act of 1974 (ERISA). **In particular, HB 1584's proposed removal from the North Dakota Century Code of the exclusion for ERISA-covered, self-insured group health plans would be in violation of ERISA's fundamental preemption provision. In doing so, if HB 1584 becomes law, it would unintentionally undermine strategies to control costs; and also result in inconsistent treatment of employees of the same employer, covered under the same plan but working in different states.**

The Council is dedicated to strengthening employer-sponsored benefit plans that provide vitally important health coverage protection to American workers and their families. The Council's members not only include large multi-state employers, but also organizations providing health plan products and support services to employers of all sizes. The Council's membership represents numerous industries employing workers in North Dakota (*e.g.* banks, financial and investment firms, airlines, hotels, insurers, agriculture equipment, energy and petroleum, telecommunications networks, etc.)

Given the importance of employer-sponsored health coverage for so many residents of North Dakota, employers in the state have a significant interest in the extent to which states may regulate self-insured, ERISA-covered plans and the proper interpretation of the law's preemption provision. A more complete explanation of the vital long-standing policy objectives supporting ERISA preemption and how HB 1584 as currently drafted is directly at odds with that policy is provided in the attachment to this letter.

While ERISA preemption enables an employer to provide consistent benefits to its workforce, by no means does it result in a one-size-fits-all approach among all employers. Quite the contrary, it allows employers in North Dakota and elsewhere to design and operate plans in a manner tailored to the unique needs of its workforce.

In light of these circumstances, and as detailed below, the Council believes that if HB 1584 is to be considered at all, unless its definition of "covered entity" is modified so as not to apply to self-insured, ERISA-covered plans the law would violate ERISA's preemption provision.

NORTH DAKOTA HB 1584

HB 1584 expands the scope of the state's insurance laws governing pharmacy benefit managers (PBMs) by removing the exclusion from such requirements for ERISA-covered, self-insured group health plans. The recent amendment to HB 1584 in the House of Representatives to the definition of "pharmacy benefit manager" *does not, in any way, alter the extent to which ERISA's federal preemption framework prevents application of these state law provisions to self-insured, ERISA-covered group health plans*. This is true whether the state law applies directly or indirectly (via regulation of the self-funded plan's PBM). The amendment merely clarifies that a plan that administers and manages its own pharmacy benefits is not considered a PBM. Nonetheless, ERISA's preemption provision applies to such a plan.

In particular, HB 1584's imposition of an "any-willing pharmacy" provider requirement on self-insured, ERISA-covered plans specifically regulates employers' benefit design choices and is squarely preempted by ERISA. The most recent federal appeals court to address this exact type of state regulation viewed it as clearly having a "connection with" the underlying ERISA-covered plans and held that the network regulation was preempted. *PCMA. v. Mulready*, 78 F.4th 1183, 1190 (Circuit Court of Appeals 2023). The U.S. Supreme Court has not yet decided whether to review the case.

HB 1584 limits the ability of plans to require the use of lower-cost, therapeutic equivalents. These plan designs are necessary to achieve efficiencies in the current drug

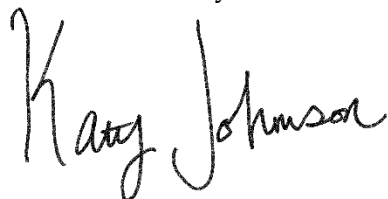
supply chain. State interference in this aspect of plan design clearly binds plans to a given benefit structure. As a result, that provision unquestionably has an impermissible connection with ERISA-covered plans and should be preempted.

The Council has similar concerns with the application of current law requirements to self-insured, ERISA-covered plans caused by HB 1584's deletion of the exception for ERISA plans in the definition of "covered entity." In particular, the Council has strong concerns with the application of the current law regulation of PBM and plan contracts. While the contracting methodology mandated under state law may provide the optimal economic outcome for some employers, other employers may seek different, value-based fee arrangements that are impermissible under the proposed law.

Flexibility is essential for employers to contract prudently with service providers, as mandated by ERISA's fiduciary duties. Requiring state-by-state contracting with plan service providers imposes the significant administrative burdens ERISA's preemption provision was designed to prevent with its focus on uniform plan administration.

The Council appreciates the committee's consideration of our comments. We urge the Committee to ensure that North Dakota legislation fully acknowledges the scope and extent of ERISA preemption. Please let us know if we may answer any questions or provide additional information that might be helpful to the Committee.

Sincerely,

A handwritten signature in black ink that reads "Katy Johnson". The signature is written in a cursive, flowing style.

Katy Johnson
President

cc:

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ERISA Preemption is Essential for Maintaining Employer-Sponsored Health Coverage

The federal Employee Retirement Income Security Act of 1974 (ERISA) preemption provision is an essential tool to ensure that multi-state employers are able to continue to offer consistent, affordable and high-value health coverage to workers and their families. It enables uniform plan administration, flexibility in plan benefit design, and the ability to treat employees consistently regardless of where they live or work.

The fundamental policies that underpinned ERISA's preemption provision when the law was enacted 50 years ago remain just as important today — indeed more so — in order to support employees' access to robust employee benefits. That is because ERISA's preemption standard is increasingly vital for mid-size and small employers as the growth in remote work and mobile nature of the workforce has transformed them into "multi-state" employers.

ERISA preemption removes a barrier to mobility of employees within an employer's workforce, facilitating the transfer of talent to other company locations and opportunities nationwide. Additionally, consistency in plan design and operation has brought tremendous value to working families and to the health system itself.

Attempts by states to regulate self-funded employer health benefits — either directly via laws specifically aimed at group health plans or indirectly via laws applicable to the plan's service provider (in the case of HB 1584, pharmacy benefit managers) — are very problematic for employers and their workforces. Such laws hinder the ability of an employer to apply a uniform drug benefit across its employee population and they undermine pharmacy benefit plan design, which employers carefully develop to provide broad, affordable access to prescription drugs.

Under well-established case law outlining the scope and application of ERISA preemption, courts evaluate whether a state law has an impermissible "reference to" or "connection with" the ERISA-covered plan in determining whether a state law is preempted by ERISA. An impermissible reference to an ERISA-covered plan arises where the state law specifically references the ERISA-covered plan or the existence of the ERISA-covered plan is essential for the state law to take effect. An impermissible

connection with an ERISA covered plan arises when the operation of the state law interferes with nationally uniform plan administration, or affects a central matter of plan administration, or imposes burdens on plans that parallel those required under ERISA, or imposes direct and/or acute economic burdens on plans, or binds the employer to a specific benefit design choice.

Several provisions of HB 1584 have obvious, impermissible connections with self-insured, ERISA-covered plans, and invade the regulation of plan administration and/or require plan sponsors to adopt specific benefit designs (*e.g.*, restrictions on pharmacy network design, plan contracting, and covered drug benefits). For these reasons the American Benefits Council urges the Committee to ensure that HB 1584, if it is to be considered, is not applicable either directly or indirectly to ERISA-covered self-funded group health plans.