Preserving Employer-Sponsored Benefit Plans: ERISA Pre-emption and Why It Is So Important to the Texas Economy

This briefing document provides an overview of one of the most important factors in preserving and enhancing job creation and capital investment in Texas: the ability of employers to structure and provide nationally uniform benefit plans for their employees. As discussed below, federal law protects these "ERISA" plans from certain state and local mandates that unduly impinge on uniform plan administration. That has not stopped state and local governments across the nation, including in Texas, from imposing or attempting to impose such mandates. We hope that this document will be helpful to legislators and policymakers as they consider proposals that affect employer-sponsored plans in ways that undermine the critically important policy objectives of ERISA.

What is ERISA?

According to the United States Supreme Court, Congress enacted The Employee Retirement Income Security Act of 1974 (ERISA) "to make the benefits promised by an employer more secure by mandating certain oversight systems and other standard procedures." *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S 312, 320-21 (2016). To do so, "Congress sought 'to ensure that plans and plan sponsors would be subject to a uniform body of benefits law,' thereby 'minimiz[ing] the administrative and financial burden of complying with conflicting directives' and ensuring that plans do not have to tailor substantive benefits to the particularities of multiple jurisdictions." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). ERISA applies *only* to employer sponsored health insurance, not to insurers in the business of selling health insurance plans. Employer-sponsored health insurance covers nearly 50% of US workers and their dependents, and self-funded plans provide nearly two-thirds of that coverage. Elizabeth McCuskey, "State Cost-Control Reforms and ERISA Preemption," Commonwealth Fund, May 16, 2022, [https://www.commonwealthfund.org/publications/issue-briefs/2022/may/state-cost-control-reforms-erisa-preemption; last accessed December 14, 2022].

What does ERISA Pre-emption Mean?

ERISA pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the Act. 29 U.S.C. §1144(a). SCOTUS has held that "[A] state law related to an ERISA plan if it has a connection with or reference to such a plan." *Egelhoff v. Egelhoff*, 532, U.S. 141, 147 (2001). In the words of the Court, "ERISA is therefore primarily concerned with pre-empting state laws that require providers to structure benefit plans in particular ways, such as by requiring payment of specific benefits, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), or by binding plan administrators to specific rules for determining beneficiary status, *Egelhoff*, 532 U.S. 141. A state law may also be subject to pre-emption if 'acute, albeit indirect, economic effects of the state law force an ERISA plan to adopt a certain scheme of substantive coverage. *Gobeille*, 577 U.S., at 320). As a shorthand for these considerations, this Court asks whether a state law 'governs a central matter of plan administration or interferes with nationally uniform plan administration.' *Ibid*. If it does, it is pre-

empted." *Rutledge v. Pharmaceutical Care Management Association*, 592 S.Ct. ___ (2020) (slip op. at 4-5).

Why is ERISA Pre-emption So Important to Private Employers and Their Employees?
According to the ERISA Industry Committee (eric.org), a Washington, D.C.-based non-profit organization that represents large employers who sponsor employee health, retirement, paid leave, and other benefit plans, "eroding ERISA preemption will adversely impact labor markets, disadvantage employees based on where they live or work, cause employers to cut back on benefit coverage, and raise the cost of health insurance and retirement plans—ultimately pricing some employees and their families out of coverage and undermining financial and health well-being." [https://www.eric.org/protecting-erisa-preemption/; last accessed on December 14, 2022]. A robust ERISA preemption doctrine protects employers and their employees from the cost and inefficiency of complying with a patchwork of local and state mandates that impose differential coverage or benefit requirements or direct employers to comply with nonstandard reporting, recordkeeping, or other plan administration mandates. Given the highly mobile workforce of today's economy, disruptions in employee benefit plans caused by local and state interventions will almost certainly have adverse economic impacts on the very governmental entities that seek to regulate them.

What Are Some of the Ways Local and State Governments Try to Evade ERISA Pre-emption?
As recently reported by The ERISA Industry Committee (ERIC), "there is a growing wave of state and local laws that attempt to impose reporting, recordkeeping, or other mandates on employers and their benefit plans." [https://www.eric.org/protecting-erisa-preemption/last accessed on December 15, 2022]. A study conducted by the Commonwealth Fund and published earlier this year aggregated legislation introduced in state legislatures for the period between January 1, 2019, and August 1, 2021. The study found more than 700 bills, which the researchers divided into five categories: (1) prescription drugs; (2) provider billing and reimbursement; (3) consumer protection; (4) health care spending data; and (5) insurance coverage. Much of this legislation does not implicate ERISA pre-emption. For example, legislation calling for price transparency for pharmaceutical products or health care provider fees or for regulation of surprise billing or pharmacy benefit manager practices does not cross the pre-emption line, even if they produce some additional cost for employer-sponsored health plans. On the other hand, legislation that mandates or prohibits certain coverages (for example, telemedicine services), regulates the cost-sharing structure of self-funded plans, establishes an all-payer claims database, or requires self-funded employer plans to collect and report demographic data about the payment of claims and health care costs, according to the study, is likely to be pre-empted. [https://www.commonwealthfund.org/publications/issue-briefs/2022/may/state-cost-control-reforms-erisa-preemption; last accessed December 15, 2022].

Local regulation presents another site of contention. For example, the cities of Seattle, San Francisco, and Oakland have adopted ordinances mandating minimum employee health contributions from hotel chain employers. These ordinances generally give the employer a choice between providing an ERISA health plan to employees, increasing contributions to existing plans, or paying an equivalent, or making direct payments to employees for health care. These so-called "pay-to-play" regulations are likely to proliferate in the wake of SCOTUS's denial earlier this year of ERIC's writ of certiorari challenging the Ninth Circuit's decision to

uphold the Seattle ordinance. In its petition for writ of certiorari, ERIC argued that the decision erroneously relied on the existence of a non-ERISA direct payment option to defeat pre-emption, a position previously rejected by both the First and Fourth Circuits. Those courts reasoned that the direct payment option was essentially illusory since no rational employer would actually choose that option, the employer would be left with a mandate to structure (or restructure) its ERISA plan to meet the minimum spending threshold. The local mandates thus had a "connection with" ERISA plans in violation of the pre-emption clause. Additionally, the courts held, the proliferation of such mandates around the nation would directly interfere with "uniform nationwide plan administration," as likewise pre-empted by ERISA. *The ERISA Industry Committee v. City of Seattle*, January 14, 2022, pp. 16-18 [https://www.eric.org/wp-content/uploads/2022/01/Petition-for-Writ-of-Certiorari-in-ERIC-v.-City-of-Seattle.pdf; last accessed December 15, 2022].

What Texas Legislation Could Employers Potentially See this Session?

Perhaps the most pressing current issue concerns whether SB 8 or subsequent legislation purporting to prohibit or a restrict an employer-sponsored health plan from covering reproductive health services and travel and other expenses necessary to obtain services in other states run afoul of ERISA pre-emption. There is little question that SB 8 directly interferes with the relationship between employers and their health plan beneficiaries. As we have seen, SCOTUS has taken a dim view of state mandates that involve payment of specific benefits, so the question arises as to whether a *prohibition* of a specific benefit would "require providers to structure benefit plans in particular ways . . . or [bind] plan administrators to specific rules for determining beneficiary status . . ." *Rutledge*, 592 U.S. at ___ (slip op. at 4-5). As to the second prong of the pre-emption test, there is no question that SB 8 "interferes with nationally uniform plan administration." Ibid. As copycat laws in other states proliferate, we are likely to see employers challenge these laws in federal courts in multiple jurisdictions.

A similar question arises in the context of gender-affirming or gender-transitioning care. To the extent that an ERISA plan covers specific treatments associated with such care, legislation prohibiting employers from offering those benefits to Texas employees while offering them to employees in other jurisdictions would have the same pre-emption problem as SB 8. Legislation already filed attempts to curtail or ban such care by prohibiting physicians and other health care providers from providing specific treatments for gender dysphoria, which if enacted will force those in need of care to travel to other jurisdictions, just as SB 8 does. It remains to be seen whether and in what way legislative proposals will try to block employers from paying benefits for these purposes.

As is occurring in other states, the Legislature will undoubtedly take another hard look at controlling health care costs. One area that appears safe for legislating without fear of ERISA pre-emption involves the regulation of pharmacy benefit managers (PBMs). At issue in *Rutledge* was a 2015 Arkansas statute that required PBMs to reimburse pharmacies at or above the pharmacies' cost to obtain the covered drug from a wholesaler. This law required PBMs to update their list specifying the maximum allowable cost (MAC) for each drug when the wholesale price changed, establish an appeals process for pharmacies challenging the amount of reimbursement, and increase the reimbursement rate if a pharmacy could not obtain the drug at a lower price than the MAC list specified from its customary wholesaler. In the event a pharmacy

could not get reimbursement from a PBM at the price of acquisition or above, the pharmacy could decline to sell the drug to a beneficiary of the plan. SCOTUS upheld the Arkansas statute over an ERISA pre-emption challenge by the Pharmaceutical Care Management Association on the basis that the statute merely established a floor for the *cost* of benefits that a plan may choose to provide, which may indirectly increase the cost of pharmacy benefits but does nothing to interfere with plan design or administration. *Rutledge*, 592 U.S. ___, slip op. at 8.

Data collection has been on the legislative agenda in the past few sessions and will likely be part of the health care cost discussion going forward. As we have seen, to the extent that a statewide data collection mandate extends to claims payment information for employer-sponsored plans, it will likely be pre-empted under *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S 312 (2016). In that case the Court held that a Vermont statute requiring all payers to report claims data to a central statewide data base was pre-empted because it subjected ERISA plan administrators to wasteful and inefficient nonstandard reporting and administrative requirements potential liability for breach of fiduciary duty, privacy, and other claims. The Court ruled that only the Secretary of Labor can require ERISA plans to report such data, not state legislatures.

Finally, any number of bills, many of which have already been introduced, mandate that employers provide certain benefits, such as paid sick leave. Bills of this type are almost certainly pre-empted because they "require employers to structure benefit plans in specific ways, such as by requiring payment of certain benefits." *Rutledge*, 592 U.S. ___ (slip op. at 5).

Conclusion

TCJL is deeply concerned about legislative initiatives that threaten employer-funded ERISA plans. Texas is the home base for more than 50 Fortune 500 companies, and it is a safe bet that the other 450 either have employees in the state or do business here, or both. Wise and far-sighted legislative policy decision over the past 35 years or so have fueled the Texas economic engine to the point that Texas as the 9th largest economy *in the world*. But we should neither rest on our laurels or take policy actions that shift our economy's gears into reverse. Making it more difficult, if not impossible, for employers to design and administer employee benefit plans that apply uniformly and respond to the needs of their workforce would be one of the worst things the Legislature could do damage the Texas business climate. Not only would such efforts result in costly and wasteful litigation over the pre-emption issue, they would send an unmistakably negative signal to major employers seeking to locate or expand in the state. They could also expose employers to significant new liability and adversely affect the health care benefits of millions of Texans. They could further discourage employers from providing robust benefit plans to attract and retain a qualified workforce, which would feed back into a negative loop that would undermine economic growth.

All of this can easily be avoided by relying on the conservative philosophy that brought us to this point. We will urge the 88th Legislature to stay on track. Preserving employer-sponsored health plans is priority one for doing that.