

March 4, 2021

Via Email

The Honorable Maggie McIntosh
Chair
Appropriations Committee
Maryland House of Representatives
House Office Building Room 121
Annapolis, Maryland 21401

Re: Large Employer Opposition to HB 581 as Preempted by Federal Law

Dear Chair McIntosh,

On behalf of The ERISA Industry Committee (ERIC), thank you for accepting comments from interested stakeholders as the Committee considers HB 581. We write to express strong opposition to HB 581 on behalf of large employers with operations in Maryland and across the country.

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. We speak in one voice for our member companies on their benefit and compensation interests. You are likely to engage with an ERIC member company when you 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 member companies have stores, factories, offices, warehouses, and other significant operations in Maryland, as well as thousands of employees and retirees. Health benefits provided by ERIC member companies are governed exclusively at the federal level by the Employee Retirement Income Security Act of 1974 (ERISA). State laws that refer to or have an impermissible connection with ERISA plans are preempted by the federal ERISA law.

ERIC does not support HB 581 and asks the Committee to vote down and withdraw the bill from consideration.

HB 581 raises serious preemption concerns, because the requirements in the bill apply to ERISA plans, which are regulated solely on the federal level. Our concerns are with section 3-1609, which does not contain a carve-out for employers who offer health benefits through ERISA plans. The legislation explicitly states that “essential employers” who are already providing “health insurance coverage” must provide additional benefits such as covering co-pay amounts or out-of-pocket expenses for health care costs “related to [an] emergency.” Since the legislation includes employers operating ERISA plans as “essential employers,” we believe that if enacted, this requirement would be preempted by ERISA. As such, ERIC would consider legal action to void the legislation, and we believe that federal courts would be likely to find the legislation preempted because of its relation to ERISA plans.

HB 581's requirement under section 3-1609 requires employers to create or change an existing, federally regulated ERISA plan. Numerous federal courts have held that state laws requiring employers to adopt a health plan or cover specific health costs through a plan are preempted by ERISA. *Shaw v. Delta Air Lines, Inc.* (463 U.S. 85, 89, 1983) held that ERISA preempted a New York law requiring payment of sick leave benefits for pregnant women.

Additionally, *Standard Oil Co. v. Agsalud*, (633 F.2d 760, 763, 9th Cir.1980) found that ERISA preempts a Hawaii law that "require[d] employers in that state to provide their employees with a comprehensive prepaid health care plan" *aff'd mem.*, (454 U.S. 801, 1981).

This proposed Maryland law is quite specific in requiring an ERISA plan to pay for certain medical costs. While it is focused on the COVID pandemic, operationally the law is similar to other state benefit mandates that require state-regulated insurance to pay for various providers, products, or conditions. It is well-established and uncontested that such laws may not apply to ERISA plans. Payment or coverage mandates that stipulate a plan cover certain costs, providers, or treatments, must be enacted at the federal level as amendments to (or incorporated into) ERISA. Different states have incredible variability in the degree of benefit mandates they have enacted, and it would be prohibitively expensive (and administratively impossible) for a multi-state employer to be subject to each of these requirements. This is the very essence and purpose of ERISA.

We believe this legislation may also violate other federal worker protection laws. The U.S. Equal Employment Opportunity Commission (EEOC) has opined that an employer has limited flexibility under the Americans with Disabilities Act (ADA), when following COVID-19 workplace guidelines from the Centers for Disease Control and Prevention (CDC), which recommend that employers conduct health screening for COVID-19 symptoms. However, HB 581 would require employers to ask detailed questions about an employee's illness to determine whether the illness is "*related to the emergency*," such that the employer must cover all associated health care costs. It is possible that such inquiries could constitute violations of the ADA or the Genetic Information Nondiscrimination Act (GINA).

In conclusion, in our view, HB 581 is an attempt to enforce certain coverage and reimbursement requirements on ERISA-governed employee benefit plans with beneficiaries in Maryland, which is preempted by ERISA law. For this legislation to survive a challenge under ERISA preemption, it must specify that employers offering ERISA plans are not subject to the new requirements. **Unless such a change is made, we urge you to oppose the legislation.**

Thank you for accepting our input on HB 581. ERIC strongly urges Committee members to oppose HB 581, and we recommend that this legislation be withdrawn from consideration. We are committed to working with you to develop legislation that does not violate federal law. If you have any questions concerning our written testimony, or if we can be of further assistance, please contact me at aguariscofildes@eric.org or 202-627-1910.

Best regards,



cc: Members of the House Appropriations Committee