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

MEMORANDUM

Date: May 25, 2023

From: Dillon Clair, Director of State Advocacy and Litigation, The ERISA Industry Committee (ERIC)

Re: North Carolina HB 246 – Regulation of Pharmacy Benefit Managers and Self-Insured Plans

The ERISA Industry Committee ("ERIC") has deep concerns with provisions of HB 246 and the expansive state regulation of pharmacy benefit managers (PBMs) and employer health benefit plans that it proposes. As currently drafted, the bill would overstep state authority to regulate insurance by seeking to control the design and operation of self-insured employer health plans governed by the federal Employee Retirement Income Security Act of 1974 (ERISA), which PBMs often administer. *If enacted, this bill would raise health insurance and prescription drug costs across North Carolina and jeopardize the affordable benefits that self-insured employer plans are able to secure and provide to participants. Because the law would conflict with federal law governing the design and administration of employer health plans nationwide, we also believe the law should and would be preempted.* As such, ERIC (on behalf of our large employer member companies) would consider filing or supporting a lawsuit challenging the law.

ERIC is a national nonprofit 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 and lawfully operate benefit plans under ERISA. This important federal law provides protection from a patchwork of different and conflicting state and local laws under one unified federal standard designed to provide employer sponsored plans with certainty as they structure their benefit plan offerings across multiple jurisdictions throughout the country.

As plan sponsors, our member companies strive to provide the best health care benefits possible to the employees, retirees, and families covered by their plans, as well as ensure that this care is available at an affordable cost. Along this line, ERIC advocates for policies that facilitate this goal and ultimately benefit the millions of employees that participate in self-insured, large-employer plans. However, the proposal outlined by HB 246 would be a step in the wrong direction, increasing statewide health care costs and potentially leading to a mismatched patchwork of state rules rather than ERISA's uniform national framework.

Large employers have long been at the forefront of innovating health care benefit design and administration. By combining nationwide workforces into uniform benefit plans, employers are able to negotiate from a position of strength and secure valuable health care coverage at reduced rates, all to the benefit of plan participants. Use of this cost-saving advantage was the precise intention behind ERISA's creation by Congress, which provides 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, employers have done just that, securing truly

effective and efficient health care coverage enjoyed today by millions of Americans.

Unfortunately, a series of state laws proposed and enacted in recent years have begun to erode ERISA preemption, endangering valuable benefits that self-insured, large-employer plans have long provided. There is growing frustration among many about PBM practices and their role in the ever-rising costs of health care, to be sure, such as how PBMs impact patient access to pharmacists or affordable drugs (such as generics and biosimilars). ERIC shares many of these concerns and has called upon Congress to increase PBM transparency and accountability through specific, meaningful federal reforms. However, many of these state proposals clearly violate, and are preempted by, ERISA because they infringe on the national uniformity of self-insured plans and overstep the limited authority that court interpretations have granted. Furthermore, many of these well-intentioned state laws have the ultimate effect of increasing health care costs across the state instead of reducing them for patients.

While ERIC understands the importance of competition between pharmacies and the desire to improve areas of health care coverage, HB 246 would overstep state authority to regulate PBMs, establish more direct control of the design and administration of self-funded ERISA plans, and further increase the health care costs that North Carolinians already face. The impact of many of the bill's provisions will likely be weighed heavily by employers with operations, employees, and health care benefit plans throughout North Carolina, and could disadvantage the state's economic climate.

First, and foremost, while HB 246 does not explicitly apply many of its broad PBM requirements directly to private, self-insured employer plan administrators, it proposes the concerning removal of key ERISA preemption language from section 58-56A-4 of existing state code. This pharmacy protection language is specifically included to shield federally governed plans from overreaching state regulation, and currently states that "*[t]his section shall not apply with respect to claims under an employee benefit plan under the Employee Retirement Income Security Act of 1974*." Removing such clear ERISA preemption language appears to open the door to even broader regulatory interpretation of HB 246 down the road and the potential application of compliance requirements otherwise aimed at PBMs to self-insured ERISA plans as well. This reality would not only be an impermissible overreach by the state but would serve to further erode the uniform benefit protections that make effective and efficient health care coverage possible on a national scale.

Second, HB 246 would impose a series of restrictions on PBM network practices that would indirectly control the design options ultimately available to self-insured plans. Specifically, the bill proposes to replace the ERISA preemption language mentioned above with section 58-56A-4(a1), which prohibits PBMs from: reimbursing pharmacy service providers in an amount less than the national average drug acquisition cost, reimbursing pharmacy service providers in an amount less than the PBM would reimburse an affiliate provider, basing reimbursement on patient outcomes, scores, or metrics, imposing a point-of-sale fee, or receive deductibles or copayments. Notably, these limitations would strip PBMs of the network design advantages that allow them to combine and reduce prescription drug costs for plan participants in the first place. Furthermore, this kind of restriction ultimately prevents plans from being designed in such a way that ensures quality of services by pharmacies both inside and outside of a plan's networks. This goes far beyond those kind of state regulations permitted under the U.S. Supreme Court's *Rutledge* decision and would open the gates for state and local lawmakers to require self-insured ERISA plans to have different plan designs in every jurisdiction across the country.

Finally, the bill appears to directly limit the ability of employers to include a wide range of cost-

sharing practices in the design of their self-insured plan, regardless of whether they are administered by a PBM. For context, section 58-51-37(a) of existing state code explicitly states that its pharmacy of choice requirements "*shall apply to all health benefit plans providing pharmaceutical services benefits, including prescription drugs, to any resident of North Carolina*", and contains no carve-out for self-insured plans that ought to be governed solely by ERISA. Following this line, HB 246 proposes the addition of language under section 58-51-37(c)(7) that would prohibit the terms of a health benefit plan from imposing:

> *… any copayment, amount of reimbursement, number of days of a drug supply for which reimbursement will be allowed, or any other payment or condition relating to purchasing pharmacy services, including prescription drugs, from any pharmacy that is more costly or more restrictive than that which would be imposed upon the beneficiary if such services were purchased from a mail-order pharmacy or any other pharmacy that is willing to provide the same services or products for the same cost and copayment as any mail order service*.

Not only would this provision overstep state authority by effectively binding self-insured plans' benefit incentive and utilization design decisions, but also appears to force plans to always secure and provide the lowest service cost available between in-network pharmacies, out-of-network pharmacies, and mail-order pharmacies. This sweeping language reflects a misunderstanding of the value that pharmacy network agreements provide to participants, disregards the realities that lead to cost differences between pharmacies for a particular service, and threatens an acute economic impact on health care costs across the state.

On the whole, HB 246 would have a broad negative impact on the design and administration of statewide health care benefits while overreaching into the control of self-funded plans subject to ERISA and afforded its preemption. If adopted, the bill would threaten to erode the ability of large-employer plans to effectively operate national, uniform benefit plans, likely lead to litigation involving ERISA preemption concerns, and undermine the ability of many employers to do business in the state of North Carolina.

If you have any questions concerning North Carolina HB 246 or the impact this legislation could have on current health care benefits throughout the state, please contact us at (202) 789-1400 or dclair@eric.org.