Business Group on Health

STATEMENT FOR THE RECORD BY

BUSINESS GROUP ON HEALTH

TO THE

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON EDUCATION & THE WORKFORCE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

"ERISA'S 50TH ANNIVERSARY: THE PATH TO HIGHER QUALITY, LOWER COST HEALTH CARE"

April 30, 2024

Chairman Good, Ranking Member DeSaulnier, and Members of the subcommittee, Business Group on Health appreciates the opportunity to submit a statement for the record on behalf of our members regarding the subcommittee's April 16, 2024, hearing: "ERISA's 50th Anniversary: The Path to Higher Quality, Lower Cost Health Care." We applaud the subcommittee for its continued recognition of ERISA's importance, in-particular that of its preemption provisions, as the foundation of American health coverage for more than 170 million Americans with employment-based plans.[1] While we were generally pleased with the discussion and discourse at the hearing, we wanted to provide additional comments help ensure the views and priorities of self-insured employer plan sponsors covering millions of American employees and families are clear to the subcommittee.

Business Group on Health represents a vibrant community of more than 440 of today's most forward-thinking employers and industry partners including 72 Fortune 100 companies, providing health coverage for 60 million workers, retirees and their families in 200 countries. Business Group members – innovative employer plan sponsors – are leading the way and encouraging others by providing strong health plan offerings, adopting alternative payment models, managing the total cost of care, promoting health equity, furthering population health, and keeping people well.

[1] U.S. Census Bureau, Health Insurance Coverage in the United States: 2022 (September 2023), Table 1. 179 million Americans participate in employment-based health coverage.

20 F Street, NW
Suite 200
Washington, DC 20001

202-558-3000
info@businessgrouphealth.org

Visit us at:
www. businessgrouphealth.org

I. Preemption

The Business Group applauds the subcommittee's recognition of and inquiry regarding the importance and primacy of ERISA preemption. We are unequivocal in our view on the importance of ERISA preemption and will continue to engage across the spectrum of stakeholders to help educate on and protect the heart and foundation of ERISA plans. (See Business Group on Health: Position Statement on Preserving ERISA[2])

We acknowledge the unfortunate and burdensome reality that ERISA preemption has been and continues to be explored for gaps, weaknesses, or opportunities to assert fragmented and burdensome non-federal authority over self-insured plans. However, those efforts have largely to-date yielded more crisp contours of preemption's boundaries and not fundamental erosion of its purpose and effectiveness for self-insured plans. Indeed, it is a testament to ERISA preemption's strength that after 50 years of near continuous inquiry and scrutiny it continues to provide a basis for plans to design and administer uniform coverage nationwide. For these reasons we believe legislation on ERISA preemption is unnecessary at this time, and we encourage the subcommittee to defend the principle that ERISA preemption is strong and must be protected and affirmed in all instances.

While additional legislation on preemption itself is not desirable, Congress should recognize that preemption is the instrument through which federal policymaking and legislation can and should drive requirements for self-insured employer plans and programs. From our comments here and the Business Group's broader policy pursuits,[3] we believe action for employers and self-insured plans is appropriate at the federal level to ensure administrable, efficient, and fair benefits and programs are provided across an employer's workforce. We encourage Congress to continue its focus on federal standards and to pursue federal legislation that is supportive and sustaining for employer-sponsored self-insured plans.

II. Fiduciary Requirements

The subcommittee's review and efforts to ensure that health care stakeholders understand and abide by their responsibilities vis-à-vis plans and participants is well-placed and important. We support additional and meaningful transparency and clarifications about when pharmacy benefit manager (PBM) services intersect with

[2] https://www.businessgrouphealth.org/resources/business-group-on-health-position-statement-on-preserving-erisa
[3] https://www.businessgrouphealth.org/resources/position-statements

fiduciary standards. (See: Business Group's Position Statement on Drug Pricing[4]) However, not all parties involved in a plan's ecosystem need be or should be fiduciaries. Employer plan sponsors and the individuals acting as the named fiduciaries of the plan(s) should continue to be empowered to determine when a partner or service provider will serve as a delegated or co-fiduciary, and ERISA already provides a mechanism to review arrangements through an operational analysis of decision-making and control. Overly broad, one-size-fits-all fiduciary amendments may raise concerns of control, discretion, and plan interpretation, misalignment between the plan and its service provider(s), increased confusion and litigation risk, wasted resources and unnecessarily higher costs that have negative impacts on employers, employees, and their families.

Employer plan fiduciaries understand and are committed to diligent decision-making and execution in accordance with ERISA's long-standing fiduciary principles. The real-life terms and practices underpinning fiduciary decision-making have and will continue to appropriately evolve over time with innovation, industry adaptation, and credible, reliable plan adoption in the myriad of disciplines incumbent in the modern provision of health coverage, including but not limited to medical, technological, data-generation/handling, transparency, privacy, and payment and reimbursement arrangements. The past 50 years have provided countless innovations, changes, and challenges – ERISA's existing fiduciary provisions for employer plans have and will continue to guide appropriate decision-making based largely on the then-current assessment of what is/was reasonable and prudent for fiduciaries at that time. Additional Congressional action risks disrupting the ever-present evolution, triggering disputes and litigation, driving waste and higher costs, and stifling innovation and improvements with calcified statutory requirements. We do not believe additional legislation is required to further clarify or expand these duties as they pertain to employer plan sponsors and their named fiduciaries.

III. Other Topics Raised in the Hearing

a. Tax treatment of employer-sponsored health coverage

Although beyond the general scope of the hearing and subcommittee, during the hearing there was a reference to the tax treatment for employer-sponsored coverage and the concept of subjecting some or all of the value of coverage to employment and/or income taxes as ordinary wages. We are thankful that the consensus among the witnesses and the Members who mentioned the issue appeared to be to maintain and not disrupt or change the current tax treatment.

[4] https://www.businessgrouphealth.org/resources/business-group-on-healths-position-statement-on-drug-pricing

We urge Congress to maintain and protect the current tax treatment of employer-sponsored coverage. Employer-sponsored plans – where most Americans get their health coverage – is a vital investment of government and private resources, additionally subsidized by employers, and highly valued by employees and their families. Eliminating or limiting the tax-free status of health coverage would not itself be or drive any improvement to the cost or quality of the health care system and would severely raise costs for working Americans and their employers who provide health coverage.

b. ERISA's standard of review, litigation dynamics, and the deleterious impacts on plans

In a couple of exchanges, the discussion turned to considerations of fiduciary decisions for benefits claims and appeals. This discourse included a suggestion that the current judicial standard of review in litigation against plans be changed from a long-standing and highly reliable standard that gives deference to uniform, prudent plan administration of the fiduciaries to a "de novo" review (often expressed as "anew" or "from the beginning") where an individual judge would interject their individual view and judgment into the underlying facts and circumstances of the claim decision and plan terms to arrive an independent conclusion of individual claim determinations. De novo review would be destabilizing and destructive for plan administration, governance, uniformity, equity, and cost. We urge Congress to recognize the risks, burdens, disruptions, and other consequences that would flow from amending the standard of review – and to refrain from making any such changes. We believe a de novo standard of review would undermine the uniform administration and stability of employer plans, and increase burdens and costs for employers, employees and their families.

c. Transparency and Competition in Health Care

We applaud the subcommittee for its continued focus on transparency and fostering competition in health care. At the hearing, we were encouraged by the substantial common ground and themes supported among the witnesses and subcommittee Members' comments and questions, including:

(1) the urgent need for effective transparency in the costs, prices, compensation structures, quality, and other factors underpinning the pricing and incentives of the health care system; and

(2) the vital importance of fair dealing and appropriate promotion and enhancement of competition among the market participants.

The Business Group has published policy positions on Transparency[5] and Promoting Competition and Innovation[6] that subcommittee Members and staff may wish to review in more detail.

Transparency is a fundamental component of an environment that fosters innovation and will drive competition. With recent and continuing gains in transparency through the Final Transparency in Coverage rules, and potential improvements in hospital and other reporting, employers have strong expectations that it will provide a solid basis for their multi-faceted programs and objectives that can curb costs, enhance quality and improve patient experience. In the Business Group's 2024 Large Employer Health Care Strategy Survey[7] the following are among the top employer priorities for transparency in order to pursue their objectives:

(1) Supporting employees and plan members so they can make informed health care decisions (87%)
(2) Requiring disclosure of PBM compensation and pricing (73%)
(3) Requiring additional reporting and standards on provider quality (58%)

From these results, employers intend to use any gains and improvements in transparency to enhance their ongoing push for innovation, value, and competition. In turn, improved offerings and more transparency will help patients and plans with decision-making and cost-containment, and aid in ensuring quality and value. We urge Congress to continue its efforts towards transparency and competition enhancing policies for employer plans.

Thank you to the subcommittee for your consideration and attention to these important matters. We would welcome the opportunity to discuss this submission or any other matters impacting ERISA health and welfare plans, plan sponsors, and other stakeholders.

[5] https://www.businessgrouphealth.org/resources/transparency-policy
[6] https://www.businessgrouphealth.org/resources/promoting-competition-and-innovation-in-health-care-policy-position-statement
[7] Business Group on Health. 2024 Large Employer Health Care Strategy Survey. August 2023. Available at: https://www.businessgrouphealth.org/resources/2024-large-employer-health-care-strategy-survey-intro