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## NATIONAL COUNCIL OF INSURANCE LEGISLATORS (NCOIL)

### RESOLUTION IN SUPPORT OF AMENDING ERISA TO ENABLE STATE POLICYMAKERS TO ENACT MORE MEANINGFUL STATE HEALTHCARE REFORMS

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*\*Sponsored by Asm. Kevin Cahill (NY) and Rep. Jim Dunnigan (UT)*

*\*To be discussed and considered during the Health Insurance and Long Term Care Issues Committee on March 15<sup>th</sup>, 2019*

**WHEREAS**, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (ERISA) was signed into law with the intent of establishing uniform federal standards to protect private employee pension plans from fraud and mismanagement, but the statute has come to apply to most other types of private employee benefit plans, including health plans; and

**WHEREAS**, the U.S. Supreme Court has held that:

- ERISA preempts “any and all” state laws that “relate to” an employee benefit plan;
- ERISA does not preempt state laws that regulate insurance;
- Self-insured employee benefit plans are not considered insurance under ERISA, therefore;
- ERISA preempts “any and all” state laws that “relate to” an employee benefit plan provided by a self-insured employer; and

**WHEREAS**, although federal law typically displaces conflicting state law in cases where compliance with state law would make compliance with the federal law impossible, ERISA goes further, broadly preempting “*any and all*” state laws that “relate to” a self-insured employee benefit plan, regardless of whether such laws conflict with existing federal laws; and

**WHEREAS**, courts’ broad interpretations of whether a state law “relates to” a self-insured employee benefit plan has put such plans essentially beyond the reach of most state health regulations, including those that seek to mandate health benefits, increase health insurance coverage, control healthcare costs, and gather information about healthcare prices and quality; and

**WHEREAS**, more than 60 percent of all workers with private, employer-based health insurance are in self-funded employee benefit plans; and

**WHEREAS**, ERISA has grown far beyond its original intent of establishing uniform federal standards to protect private employee pension plans from fraud and mismanagement, and has transformed into a critical barrier for states seeking to enact meaningful healthcare reforms; and

**WHEREAS**, in order to ensure that states continue serving their role as sources of healthcare innovation in the most meaningful way, federal action is needed to amend ERISA; and

**WHEREAS**, ERISA - unlike most federal healthcare statutes such as Medicaid, Medicare, and the Affordable Care Act (ACA) - does not contain waiver provisions that enable states to pursue policy experiments consistent with the states' role as "laboratories of democracy"; and

**WHEREAS**, statutory waivers can provide states flexibility to work within a federal statutory scheme and mitigate unintended consequences of federal laws; and

**WHEREAS**, amending ERISA to add a statutory waiver provision that would allow states to apply to the Department of Labor (DOL), which could coordinate with the Departments of Treasury and Health & Human Services, for approval to deviate from certain ERISA preemption provisions in order to pursue certain healthcare reforms would simultaneously preserve ERISA's preemption baseline and encourage supervised state experimentation with healthcare reform efforts in a proven, successful state regulatory scheme; and

**WHEREAS**, such a waiver process would not only restore states' autonomy and ability to experiment with policy solutions to benefit their citizens, but shift some of the authority over state healthcare reform efforts from courts to agencies, thereby relying on agencies' substantive expertise rather than courts' preemption precedents; and

**WHEREAS**, NCOIL recognizes that states can and do enact meaningful healthcare reforms, but such reforms would be much more meaningful if applicable to all of a state's privately insured citizens; and

**WHEREAS, NOW, THEREFORE, BE IT RESOLVED**, that NCOIL urges members of Congress to take action and pass legislation that would amend ERISA to add a waiver provision enabling states to include self-insured single state employers in a wide range of healthcare reforms; and

**BE IT FINALLY RESOLVED**, that a copy of this Resolution be sent to the members of the U.S. House Financial Services Committee; the members of the Senate Banking Committee; the Speaker and Minority Leader of the U.S. House of Representatives; the Majority Leader and Minority Leader of the U.S. Senate; the Secretary of the Department

of Labor; the Secretary of the U.S. Department of Health and Human Services; the National Association of Insurance Commissioners (NAIC); and the Chair of all state committees that have jurisdiction over insurance matters.