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Employee Retirement Income Security Act (ERISA) (B) Working Group

Virtual Meeting (*in lieu of meeting at the 2021 Summer National Meeting*)

July 30, 2021

The Employee Retirement Income Security Act (ERISA) (B) Working Group met July 30, 2021. The following Working Group members participated: Robert Wake, Chair (ME); Jennifer Li and Anthony L. Williams (AL); Jason Lapham (CO); Angela Burke Boston and Johanna Nagel (IA); Julie Holmes (KS); Victoria Bares (MN); Cynthia Amann and Amy Hoyt (MO); Ted Hamby (NC); Laura Arp and Martin Swanson (NE); Laura Miller (OH); Andrew Schallhorn (OK); David Bolduc (TX); Jaakob Sundberg (UT); Mandy Weeks-Green (WA); and Richard Wicka (WI).

1. Discussed *Rutledge v. Pharmaceutical Care Management Association*

Mr. Wake said the purpose of the Working Group’s meeting is to discuss addressing the Supreme Court’s 2020 decision in the case of *Rutledge v. Pharmaceutical Care Management Association*, 141 S.Ct. 474 (2020). He suggested, and the Working Group agreed, to include this case in the *Health and Welfare Plans Under the Employee Retirement Income Security Act: Guidelines for State and Federal Regulation* (ERISA Handbook) in the section summarizing seminal ERISA preemption cases. Mr. Wake said a preliminary draft of a summary to add to the ERISA Handbook has been developed. He asked state insurance regulators to email Jennifer Cook (NAIC) if they are interested in participating in a drafting group to develop a draft to circulate for public comment.

Mr. Wake said, in addition, the Pharmacy Benefit Manager Regulatory Issues (B) Subgroup of the Regulatory Framework (B) Task Force has a charge to develop a white paper on issues related to the state regulation of certain pharmacy benefit manager (PBM) business practices. He said the Working Group has been identified to assist with addressing the ERISA preemption aspects of the *Rutledge* decision in the white paper. Ms. Arp said she would like the Working Group to explore the ERISA preemption implications of the *Rutledge* decision on other state laws, like laws that affect pricing. She said that there are state laws that are written to say they apply “except to the extent they are preempted.” She said this raises questions about the application of such a law in light of the holding in *Rutledge* that the Arkansas pharmaceutical pricing law was not preempted. She suggested that the Working Group develop a list of factors that states need to consider in analyzing their state laws to determine whether the *Rutledge* decision has an impact and what that impact might be. She said it would be helpful to include the U.S. Department of Labor (DOL) in any discussions and get their feedback. Mr. Wake asked and Ms. Arp agreed to chair a drafting group to look at developing a “preemption road map” for states on this issue. Mr. Wake asked state insurance regulators interested in participating on this drafting group to email Ms. Cook.

Ali Khawar, who is the Acting Assistant Secretary for the Employee Benefits Security Administration (EBSA) at the U.S. Department of Labor (DOL), introduced himself to the Working Group. He explained that he has previously served in a variety of roles at the DOL, including as an EBSA investigator, in EBSA’s Office of Enforcement, as EBSA’s Chief of Staff in two administrations, and as a Counselor to the 26th Secretary of Labor, Thomas E. Perez. Mr. Khawar said he is looking forward to continuing the important collaborative relationship the DOL has established with the NAIC over the years. He said whether collaborating over regulations or enforcement matters, the ability to share best practices and tips on what states are seeing has been very valuable to the DOL. Mr. Wake agreed that the relationship the Working Group and the NAIC has enjoyed with the DOL over the years has been mutually beneficial, and he said that they look forward to continuing the relationship.

Having no further business, the Employee Retirement Income Security Act (ERISA) (B) Working Group adjourned and reconvened in regulator-to-regulator session pursuant to paragraph 1 (potential or pending litigation or administrative proceedings), paragraph 2 (pending investigations), paragraph 3 (specific companies, entities or individuals), and paragraph 9 (any other subject required to be kept confidential) of the NAIC Policy Statement on Open Meetings.

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