IN THE SUPREME COURT OF THE STATE OF NEVADA

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| DEPARTMENT OF BUSINESS AND INDUSTRY, Division of Insurance; ALICE A. MOLASKY-ARMAN, COMMISSIONER OF INSURANCE,<br><br>Appellants,<br>vs.<br><br>PAYROLL SOLUTIONS GROUP, LIMITED, INC.; PAYROLL SOLUTIONS, INC., PAYROLL SOLUTIONS, INC.; PAYROLL SOLUTIONS II, INC.; PAYROLL SOLUTIONS III, INC.; PAYROLL SOLUTIONS IV, INC.; PAYROLL SOLUTIONS V, INC.; PAYROLL SOLUTIONS VI, INC.; PAYROLL SOLUTIONS VII, INC.; HOWARD WINTERS, an individual; SUZANNE WINTERS, an individual; TIMOTHY MEINFIELD, an individual,<br><br>Respondents. | Case No. 50678 |

**NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AMICUS CURIAE BRIEF**

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## I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

### A. Identity of Amicus Curiae

The National Association of Insurance Commissioners ("NAIC") is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Founded in 1871, it is the nation's oldest association of state government officials. The NAIC represents the coordinated and considered views of the state government officials that regulate and enforce the insurance laws of the country.

The mission of the NAIC is:

> [t]o assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members: protect the public interest; promote competitive markets; facilitate the fair and equitable treatment of insurance consumers; promote the reliability, solvency and financial solidity of insurance institutions; and support and improve state regulation of insurance. National Association of Insurance Commissioners, Mission Statement, *http://www.naic.org/index_about.htm* (last visited Aug. 13, 2008)

The NAIC performs numerous crucial services on behalf of state government, including: the development and publication of model laws, regulations, bulletins and financial and accounting standards; the coordination of quarterly national meetings and interim meetings of various NAIC committees, task forces and working groups; the creation and publication of white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*; the management of accreditation standards for, and coordination of, the review of state insurance departments; the maintenance of financial and regulatory databases and regulatory analysis of insurance company financial data; the offering of education and training programs for state, federal and international insurance financial regulators; and the operation of the Securities Valuation Office. Any member of the NAIC may request the filing of an amicus brief. Such request requires approval by the Executive Committee of the NAIC.

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**B. Interest of Amicus Curiae**

The NAIC's interest in this case stems from national concerns regarding the regulation of Multiple Employer Welfare Associations (or MEWAs). The interplay of the Employee Retirement Income Security Act of 1974 (ERISA)[1] with the states' power to regulate the business of insurance is of great interest to our members. This case is of critical importance, as the statutory language at issue challenges the authority ERISA specifically grants to the states to regulate MEWAs. The U.S. Congress has continually recognized the primacy of the states over the regulation of insurance. Because Congress has seen fit to defer to the expertise of the state insurance departments, the NAIC will vigorously protect its members' right to regulate. Payroll Solutions seeks to avail itself of a Nevada statute that should not be given effect. The statute is in contravention of federal law, and legal precedent will show that it should be preempted.

## II. STATEMENT OF THE CASE

Payroll Solutions enters into leasing agreements with client employers from various industries.[2] It provides various administrative services and health benefits to the employees of client employers.[3] In 2006, Commissioner Molasky-Arman found that Payroll Solutions' employee benefit plan was a multiple employee welfare arrangement ("MEWA"), operating without a certificate of authority.[4] In 2007, the Nevada legislature amended the insurance code to provide that an employee leasing company shall be deemed the employer of its leased employees for purposes of ERISA.[5] The District Court for Clark County subsequently found the amendment to be a clarification of existing law and set aside the Order of the Commissioner.[6]

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[1] 29 U.S.C. § 1001, *et seq.*

[2] *See* U.S. Dept. of Labor, Information Letter, March 24, 2008, attached hereto as Exhibit A.

[3] *See id.*

[4] *See* U.S. Dept. of Labor, Advisory Opinion 2007-05A (August 15, 2007).

[5] *See id.*

[6] *See Payroll Solutions v. Nevada*, Case No. A527066 (8th Jud. Dist. Ct. Nev. Oct. 24, 2007).

## III. SUMMARY OF ARGUMENT

The NAIC joins the DOI's request for this Court to review whether the District Court erred in granting Payroll Solutions' Petition for Judicial Review by relying on NRS 616B.691(2) as amended, rather than declaring the statute preempted by ERISA. It is the NAIC's position that:

A. Payroll Solutions operates a MEWA and should be subject to Nevada's Insurance Code.

B. The amendment to NRS 616B.691(2) is preempted by ERISA and does not achieve its purpose of defining Payroll Solutions as a single employer.

## IV. ARGUMENT

### *A. Payroll Solutions operates a MEWA and should be subject to Nevada's Insurance Code.*

A key component in this case is the recognition by Congress, as evidenced in ERISA, that MEWAs should be subject to state regulation.

ERISA was amended effective in 1983 to address the problem of multiple employer trusts (METs) that became insolvent and left thousands of employees with unpaid claims.[7] These self-insured trusts were subject to ERISA welfare plan requirements, which were more lenient than state laws as to reserves, funding and benefits.[8] State insurance regulators were unable to intervene in the failure of the METs.

The 1983 amendment created the MEWA as an entity and provided that fully insured MEWAs are subject to states' standards for reserves and contributions rather than those of ERISA.[9] MEWAs that are not fully insured are subject to state laws not inconsistent with ERISA, unless the U.S. Department of Labor has specifically exempted the MEWA.[10]

The first essential element of this case is the State of Nevada's correct determination that Payroll Solutions operates a MEWA. ERISA defines MEWA as:

an employee welfare benefit plan, or any other arrangement (other than an employee

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[7] *See* Samuel G. Oberstein, *The Erlenborn/Burton Act: Regulatory Approaches Vary on Use of Amendment to ERISA*, *J. Ins. Reg.*, 471, 473 (June 1989), attached hereto as Exhibit C.

[8] *See id* at 474.

[9] 29 U.S.C.A. §§ 1002(40)(A), 1144(b)(6)(A).

[10] 29 U.S.C.A. § 1144(b)(6)(A).

> welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) [such benefits include, but are not limited to, medical, accident, disability, death, unemployment, vacation, and prepaid legal services] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained
> (i) under or pursuant to one of more agreements which the Secretary finds to be collective bargaining agreements,
> (ii) by a rural electric cooperative, or
> (iii) by a rural telephone cooperative association.[11]

Payroll Solutions Inc. is an employee leasing company that enters into agreements with multiple client employers to provide administrative services and health benefits. Payroll Solutions, which is trying to cast itself as a "single employer", does not hire, fire, evaluate the performance of, or direct work to the employees who are the recipients of benefits under this unregulated enterprise.

The crucial factor in determining whether an entity is a single employer under ERISA is the nature of the relationship between the employer and the employee-beneficiaries. In examining the status of an employee leasing company in 1992, the U.S. Department of Labor described the ERISA-mandated relationship:

> ...merely because a person, group or association may be determined to be an "employer" within the meaning of ERISA section 3(5) does not mean that the individuals covered by the plan with respect to which the person, group or association is an "employer" are "employees" of that employer.[12]

The Department listed several criteria for determining whether an employer-employee relationship exists, including whether the "employer" has control and direction over the individual who performs the services and has the right to discharge the individual.[13] In the absence of this direct relationship, it is appropriate to find a plan providing benefits to the employees of two or more employers to be a MEWA.

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[11] 29 U.S.C.A. § 1002 (40)(A).
[12] *See* U.S. Dept. of Labor, Advisory Opinion 92-07A (February 20, 1992), attached hereto as Exhibit D.
[13] *See* id.

Payroll Solutions has not attempted to show how its employee benefit plan escapes the substance of ERISA's MEWA definition, nor has it been able to demonstrate a direct employer-employee relationship between Payroll Solutions and the plan beneficiaries.

ERISA's special attention to MEWAs is prompted by concerns shared by the NAIC; specifically, that state regulation is appropriate in a context where consumer and business protection could be jeopardized. With no direct relationship between the MEWA and the plan beneficiaries, the MEWA may not be motivated to fairly and efficiently administer benefits. A single employer would feel this motivation in order to thrive as a business and attract quality employees.

It is the potential for fraud and insolvency that is of paramount concern to the NAIC's members:

> MEWAs that operate fraudulently and that do not comply with state regulatory requirements harm both employers and employees, often in a relatively short period of time. Employers contributing to these fraudulent MEWAs have lost their investment in the employee benefit they sought to offer and employees are left with unpaid claims and no health insurance.[14]

State-based insurance regulation frequently seeks a balance between consumer protection and financial solvency. An illegally-operating MEWA not complying with the laws and regulations that exist to further these objectives is a risk to the consumers state insurance regulators are charged with protecting.

In 2006, the NAIC adopted the Prevention of Illegal Multiple Employer Welfare Arrangements (MEWAs) and Other Illegal Health Insurers Model Regulation. The regulation establishes specific standards, including requirements for reporting, as to persons and licensees who become aware of, or are asked to assist, such an operation.[15] The penalty provision of the model regulation works in tandem with the NAIC's Nonadmitted Insurance Model Act to ensure there are consequences for evading state regulation.[16] The NAIC's Model Regulation on MEWAs

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[14] N.A.I.C., Health and Welfare Plans Under the Employee Retirement Income Security Act: Guidelines for State and Federal Regulation, White Paper 34 (2004), attached hereto as Exhibit F.

[15] *See* Prevention of Illegal Multiple Employer Welfare Arrangements (MEWAs) and Other Illegal Health Insurers Model Regulation, 2 NAIC *Model Laws, Regulations and Guidelines*, 220-1 (2007).

[16] *See* Prevention of Illegal Multiple Employer Welfare Arrangements (MEWAs) and Other Illegal Health Insurers

represents a collaborative effort among the states to prevent the illegal operation of these entities. Twenty-three states served on the ERISA Subgroup of the Regulatory Framework Task Force at the time of drafting.[17] Collectively, the Subgroup drafted a provision that requires reporting where the licensee knows that the product is represented to be a self-funded plan and that it is offered widely to the multiple employers or generally to individuals".[18]

The NAIC's efforts in this area demonstrate widespread support for aggressive regulation of MEWAs. The potential for damage to well-meaning employers and their workers requires state insurance regulators to be vigilant. Commissioner Molasky-Arman acted appropriately, and in accordance with the authority reserved to her under ERISA and with the NAIC's standards, by finding Payroll Solutions' plan to be a MEWA and putting a stop to its unauthorized transaction of insurance in Nevada.

The Commissioner and the Attorney General's Office sought guidance from the U.S. Department of Labor in regard to Payroll Solutions' operations, and all of these entities gave serious consideration to the requirements of ERISA and its definition of MEWA. In an advisory letter from the U.S. Department of Labor to the Nevada Attorney General, issued on May 8, 2006, the Department analyzed Payroll Solutions' claim of single-employer status.[19] As the benefit plan included employees of two or more employers, the Department found that Payroll Solutions' plan was a MEWA subject to state regulation.[20] The Department also commented on the effect of related state statutes:

> It is the Department's view that whether an arrangement is a MEWA within the meaning of section 3(40) is a question of federal law...A state statute addressing the leasing company relationship to leased employees would not govern the determination of whether any particular arrangement is a MEWA by reason of providing benefits to the employees of two or more employers.[21]

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Model Regulation, 2 NAIC *Model Laws, Regulations and Guidelines*, 220-1 (2007); Nonadmitted Insurance Model Act , 3 NAIC *Model Laws, Regulations and Guidelines,* 870-1 (1997).

[17] *See* 2 Proc. of the Nat'l Ass'n of Ins. Comm'rs 37, 119 (2007).

[18] *See* Prevention of Illegal Multiple Employer Welfare Arrangements (MEWAs) and Other Illegal Health Insurers Model Regulation, 2 NAIC *Model Laws, Regulations and Guidelines*, 220-1 (2007).

[19] *See* U.S. Dept. of Labor, Information Letter (May 8, 2006), attached hereto as Exhibit E.

[20] *See id.*

[21] *Id.*

This deliberative process stands in stark contrast to the actions of the Nevada legislature in amending Nev. Rev. Stat. § 616B.691(2). The NAIC is troubled that an insurance commissioner's diligent investigation and administrative remedy could be so easily undone by a short-sighted amendment passed during the closing hours of the legislative session. The amendment not only strips the Commissioner of regulatory authority, but also renders itself ineffective by its very language, as will be discussed below.

It is critical that Commissioner Molasky-Arman be empowered to regulate Payroll Solutions' employee benefit plan as a MEWA.

*B. The amendment to Nev. Rev. Stat. § 616B.691(2) is preempted by ERISA and does not achieve its purpose of defining Payroll Solutions as a single employer.*

The amended Nev. Rev. Stat. § 616B.691(2) reads as follows:

> If an employee leasing company complies with the provisions of subsection 3, the employee leasing company shall be deemed to be the employer of its leased employees for the purposes of sponsoring and maintaining any benefit plans, including, without limitation, for the purposes of the Employee Retirement Income Security Act of 1974.

When the legislature invoked ERISA in its attempt to define an employee leasing company as a single employer, it effectively invited preemption of the state statute by ERISA. As ERISA provides a specific definition that clearly identifies Payroll Solutions' employee benefit plan as a MEWA, the amended statute has no effect on these proceedings.[22]

Before discussing the applicable statutory language and caselaw, it is important to understand the shifting authority in this circumstance. ERISA provides that MEWAs are subject to state regulation. Payroll Solutions points to a state statute that defines a leasing company as a single employer for purposes of ERISA, which would then subject Payroll Solutions to regulation under ERISA only. However, we assert that the state statute is preempted by ERISA's terms, which places Payroll Solutions' employee benefit plan back under the authority of the state of Nevada.

[22] *See* Exhibit E.

Section 514 of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" that is subject to ERISA.[23] The "relate to" language is open to interpretation, and the U.S. Supreme Court gave it a broad application in the 1983 case, *Shaw v. Delta Air Lines*. The court held:

> The breadth of 514(a)'s pre-emptive reach is apparent from that section's language. A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan…We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.[24]

However, the court did not stop at the plain meaning argument when determining the section's broad reach. The court noted that ERISA specifically exempts state criminal statutes. If Congress had intended that preemption would only apply to state laws dealing specifically with ERISA plans, an exemption of tangentially-related criminal laws would not have been considered.[25] Additionally, the legislative history of ERISA showed that the Conference Committee rejected a more limited clause which provided for preemption only where state laws related to the specific subjects covered by ERISA.[26]

The *Shaw* case set the standard for determining whether a state law "relates to" an employee benefit plan. This analysis is necessary if the connection is not plainly evident from the statute's text. In situations where a state statute specifically invokes ERISA in an attempt to define an entity for those purposes, however, preemption is a foregone conclusion.

The amended Nev. Rev. Stat. § 616B.691 expressly refers to ERISA when it defines an employee leasing company to be a direct, single employer to its leased employees for purposes of ERISA. However, the amended statute is in conflict with ERISA, which clearly states that a plan providing benefits to the employees of two or more employers is a MEWA. Consequently, ERISA's definition of a MEWA determines the status of Payroll Solutions' plan and subjects it to state regulation.

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[23] 29 U.S.C. § 1144(1).
[24] *Shaw*, 103 S.Ct. 2890, 2899-2900 (1983).
[25] *See id.* at 2900.
[26] *See id.* at 2900-2901.

The amended Nevada statute purports to define an employee leasing company as a single employer *for purposes of ERISA*. The Department of Labor was very clear in its letter of May 8, 2006 that whether an arrangement is a MEWA is a question of federal law.[27] The Department pointed to legal precedent holding that the term "employee" as it is referenced in ERISA should be construed under the common law of agency. The U.S. Supreme Court specifically rejected the relevance of state law in this context.[28]

What the Nevada Legislature has attempted to do with this amendment is outside the scope of its authority. It should be noted that the Legislature can choose not to regulate MEWAs. A subsequent advisory opinion from the Department of Labor points out that, "Although section 514 (b)(6) of ERISA allows state insurance regulation of employee benefit plans that are MEWAS, subject to certain limits, it does not require states to do so".[29] The NAIC recognizes that states are free to regulate (or not regulate) MEWAs as they see fit. For whatever reason, the Legislature did not pursue that legitimate goal. Instead, it attempted to carve out an exception for employee leasing companies from ERISA's definition of MEWA. As state law is irrelevant to interpretation of ERISA provisions, the amended statute should not have any bearing on the Commissioner's order.

When the Nevada legislature attempted to define an entity "for purposes of ERISA", it triggered federal statutory preemption. Therefore, the amendment must not succeed. The whole doctrine of preemption is compromised when a state legislature is permitted to create exceptions for certain individual entities in disregard of controlling federal law.

## V. CONCLUSION

The regulation of MEWAs should be left to the states. This was clearly the intent of Congress when it amended ERISA. State insurance commissioners are connected to consumers in a way that is difficult to achieve at a federal level. They are accountable to their state's citizens, and the reserve and benefits standards at the state level reflect this.

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[27] *See* Exhibit E.
[28] *See id*, citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, n. 5 (1992).
[29] *See* Exhibit B.

If Payroll Solutions prevails in this case, the consequences will be far-reaching for state departments of insurance. The U.S. Congress has consistently recognized the important role of state-based regulation of insurance. The Erlenborn/Burton amendment to ERISA was a strong statement that individual states are best equipped to regulate those entities that pose the most danger to consumers, as well as the employers who utilize the services of a MEWA even with the best of intentions.

The ERISA regulatory framework is based on deference to state authority over MEWAs that are not fully insured. The Nevada State Legislature does not have the authority to assign a particular ERISA status to a particular entity in order to allow that entity to evade state regulation. For all of these reasons, the NAIC respectfully requests that this Court overrule the order of the district court granting judicial review based on the amended state statute.

DATED this 18th day of August, 2008.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters of record to be supported by a reference page of the transcript or appendix where the matter relied on is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not inconformity with the Nevada Rules of Appellate Procedure.

DATED this 18th day of August, 2008.

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## CERTIFICATE OF MAILING

I hereby certify that I am an employee of the firm of Jones Vargas, and that on the 18th day of August, 2008, I caused a true and correct copy of the within NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AMICUS CURIAE BRIEF to be deposited for mailing in the United States Mail at Reno, Nevada, with first class postage thereon prepaid, addressed to the following persons:

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