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For Immediate Release  
April 3, 2019  
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## **NCOIL PASSES RESOLUTION TO AMEND ERISA**

*Recognizes that State Policymakers Need Greater Flexibility in State Healthcare Policy Decisions*

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Manasquan, NJ – The National Council of Insurance Legislators (NCOIL) passed a resolution in support of amending the Employee Retirement Income Security Act of 1974 (ERISA) to enable state policymakers to enact more meaningful state healthcare reforms at the 2019 NCOIL Spring Meeting in Nashville, TN. The resolution was sponsored by New York Assemblyman Kevin Cahill, NCOIL Secretary, and Utah Representative Jim Dunnigan.

“As Chair of the Assembly Standing Committee on Insurance in New York I am proud that my committee works to make sound public policy for the residents of the state.” said Cahill. “But I am also frustrated that ERISA has been broadly interpreted by the courts to strike down state initiatives on issues as diverse as air-ambulance balance billing, all-payer claims databases, and regulation of pharmacy benefits managers.”

“The goal of ERISA when signed into law by President Gerald Ford 45 years ago was to protect private employee pension plans from fraud and mismanagement” said Dunnigan. “It has since come to apply to most other types of private employee benefit plans, including health plans, and has morphed into a pre-emption cudgel that stifles policy innovation at the state level.”

At the 2018 NCOIL Annual Meeting in Oklahoma City, there was a general session moderated by TX Rep. Tom Oliverson, MD, Vice Chair of the NCOIL Health Insurance and Long Term Care Issues Committee, titled “Examining the Role of ERISA in the State Based System of Insurance Regulation: Can Meaningful State Reforms be Achieved in an ERISA-Dominated Marketplace?” with participants including Professor Jonathan Forman, Kenneth E. McAfee Centennial Chair in Law, University of Oklahoma College of Law; James Gelfand, Senior Vice President -Health Policy, ERISA Industry Committee (ERIC); Professor Elizabeth McCuskey of the University of Toledo College of Law; and, The Honorable Jessica Altman, PA Insurance Commissioner. The session was one of the highlights of the Meeting and ultimately led to the introduction of this Resolution. During the Oklahoma City session, Professor McCuskey delivered a presentation that was particularly noteworthy, due in large part to her recommendations as to how states can take the lead in expanding healthcare access and regulating health insurance by means of altering the current ERISA-landscape.

Professor McCuskey offered a few options for consideration, one of which spurred the dialogue that



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led to this Resolution. This approach is one in which ERISA’s preemption baseline is preserved and national uniformity is the default rule, but states could seek waivers from the Department of Labor (DOL) – hopefully in consultation with the Department of Health and Human Services (HHS) – so that states can pursue experiments relating to healthcare reform.

“As stated in the resolution, we urge 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” said Commissioner Tom Considine, NCOIL CEO. “Other federal healthcare laws, such as Medicare, Medicaid and the Affordable Care Act (ACA) contain such waiver provisions; ERISA should as well.”

A copy of the resolution is below and it will 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.

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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

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

*\*Approved by the Health Insurance and Long Term Care Issues Committee on March 15<sup>th</sup>, 2019 and affirmed by the Executive Committee on March 17<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:



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- 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



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**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.

*NCOIL is a national legislative organization with the nation's 50 states as members, represented principally by legislators serving on their states' insurance and financial institutions committees. NCOIL writes Model Laws in insurance and financial services, works to preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act seventy four years ago, and to serve as an educational forum for public policymakers and interested parties. Founded in 1969, NCOIL works to assert the prerogative of legislators in making State policy when it comes to insurance and educate State legislators on current and longstanding insurance issues.*



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