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Legislative Counsel Committee

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To: Senator Cedric Hayden

From: Erin Jansen, Deputy Legislative Counsel

Subject: ERISA Claims Assessment

Enclosed are the requested -A6 amendments to A-engrossed House Bill 2010. As previously discussed, there are several legal issues with the -A6 amendments as requested.

1. Bill for raising revenue.

The -A6 amendments, if adopted, will turn HB 2010-A into a bill for raising revenue. Insurance carriers, as defined in the -A6 amendments, do not receive any benefit from the Oregon Reinsurance Program.The payers would receive only the benefits of good government generally.

Whether the Origination Clause in Article IV, section 18, of the Oregon Constitution, permits a Senate revenue raising amendment to a non-revenue raising bill is a question that has not been answered by Oregon courts. Among other jurisdictions with Origination Clause provisions, there is a split of authority; the courts of a majority of states do not look beyond the bill number in determining the origination of the revenue raising provision, but a minority of other jurisdictions do consider the source of the revenue raising provision.

The most analogous Oregon case is *City of Seattle v. Dep't of Revenue*, 357 Or. 718 (2015). Although this case ultimately found that a Senate bill was not a bill for raising revenue, the concurrence written by Justice Kistler suggests that the relevant determination for where a bill "originated" is not the title of the bill, but where the provisions for raising revenue originated. Based on this, we believe HB 2010-A, if amended as requested, would be subject to a challenge on this issue.

2. ERISA Preemption

Although there is a 6th Circuit case which finds that a similar law in Michigan would not be preempted by under the Employee Retirement Income Security Act of 1974 (ERISA), there are significant differences in the -A6 amendments to the law passed in Michigan which suggest a potentially different preemption outcome.

In *Self-Ins. Inst. of Am., Inc. v. Snyder*, the 6th Circuit examined a Michigan state law that imposed a one-percent tax on all "paid claims" by "carriers" or "third party administrators" for services rendered in Michigan and for Michigan residents.[1]

In addition, every carrier and third-party administrator was required to submit quarterly returns to the Michigan Department of the Treasury and to keep accurate and complete records and pertinent documents as require by the department, as well "develop and implement a methodology by which it will collect the [tax]".[2]

Initially, the 6th Circuit affirmed a district court decision that this law was not preempted by ERISA. On certiorari, the United States Supreme Court remanded the case based on their ruling in *Gobeille v. Liberty Mut. Ins. Co.,* which held that a Vermont state law which required reporting of payments relating to health care claims and other information relating to health care services was preempted as applied to ERISA plans.[3]

On remand, the 6th Circuit distinguished the requirements in the Michigan law in several key areas to find that the Michigan law was not preempted. However, these distinguishing factors are significant, and not all are present in the requested -A6 amendments.

ERISA contains an express preemption provision that "supersede[s] any and all State laws insofar as they . . . relate to any employee benefit plan" that is regulated by ERISA.[4] The Court has found that a state law "relates to" an employee benefit plan if it "has a connection with or reference to such a plan.[5] In *Synder*, only whether the state law had a "connection to" an ERISA plan was properly before the court.

In analyzing the "connection with" element, the court started with a presumption that Congress generally does not intend to preempt state laws in areas of traditional state concern such as taxes.[6] However, the court goes on: "a law has an impermissible 'connection with' ERISA plans" when it "'governs . . . a central matter of plan administration' or 'interferes with nationally uniform plan administration.' [. . .] A state law also might have an impermissible connection with ERISA plans if 'acute, albeit indirect, economic effects' of the state law 'force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers"[7] The 6th Circuit concluded that although "*Gobeille* recognized that "reporting, disclosure, and recordkeeping are central to, and an essential part of, the uniform system of plan administration contemplated by ERISA," it held that only state laws that directly regulate these aspects of ERISA—whether by imposing additional administrative burdens or by interfering with uniform administration—are preempted" the Michigan law required only incidental reporting, which had been found permissible by the Court in two cases.[8]

The only other effect on an ERISA plan was the potential to cut the plans' profits. The court relied in *De Buono* and *Travelers*, which concerned a "surcharge" imposed on hospitals. In the limited time available, we were not able to analyze whether the surcharge imposed in these

[1] 827 F.3d 549 (6th Cir. 2016).
[2] *Id*. at 553.
[3] 577 U.S. 312, (2016).
[4] 29 U.S.C. 1144(a).
[5] *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96-97 (1983).
[6] *Snyder* at 555.
[7] *Id*. citing *Gobeille*, 136 S.Ct. at 943, additional citations removed.
[8] *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, (1997); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, (1995).

cases had different implications for ERISA preemption than the broad claim assessment imposed in these amendments. However, given the nuance of ERISA preemption, we expect this would be reviewed closely in any litigation.

However, significantly, the Michigan law placed the burden to collect this assessment on "carriers and third-party administrators" and whether to collect the tax from ERISA entities was permissive. Therefore, the law did not require carriers and third-party administrators to change plan documents.

Finally, the 6th Circuit did not discuss whether the state law "refers to" an ERISA plan. This is perhaps the easier preemption issue, and likely the most harmful to the -A6 amendments. The Court has found that "a [state] law has the forbidden reference where it acts immediately and exclusively upon ERISA plans [. . .], or where the existence of such plans is essential to its operation."[9] Although we were not able to review extensive case law on this issue in the limited time available, the -A6 amendments, as drafted, appear to clearly meet both of these standards and would therefore be preempted.

Given that the decisions of the 6th Circuit are not binding in Oregon, the significant differences in the Michigan law and the proposed -A6 amendments and the complex nature of ERISA preemption case law, it is impossible to determine with any certainty whether the -A6 amendments, if adopted, would survive an ERISA preemption challenge. However, at a minimum, we expect a legal challenge would be brought.

Encl.

[9] *California Div. of Lab. Standards Enf't v. Dillingham Const., N.A., Inc*., 519 U.S. 316, 117 S. Ct. 832, (1997).