

**FOOD FOR  
THOUGHT**



# 50th Anniversary of ERISA: How Employer Coverage & ERISA Work For Texans

September 12, 2024



# Employer-Provided Coverage: 13.8 Million Texans



**98% of large employers offer coverage in Texas.**



**Texas employers cover nearly half of all Texans** and 85% of employees say health insurance is a “must-have”.



**71% of employers said offering health insurance is extremely important** for hiring and retaining workers.



**Employers cite a 47% return on investment** for offering health coverage.



**Only 27% of small employers offer coverage in Texas.**



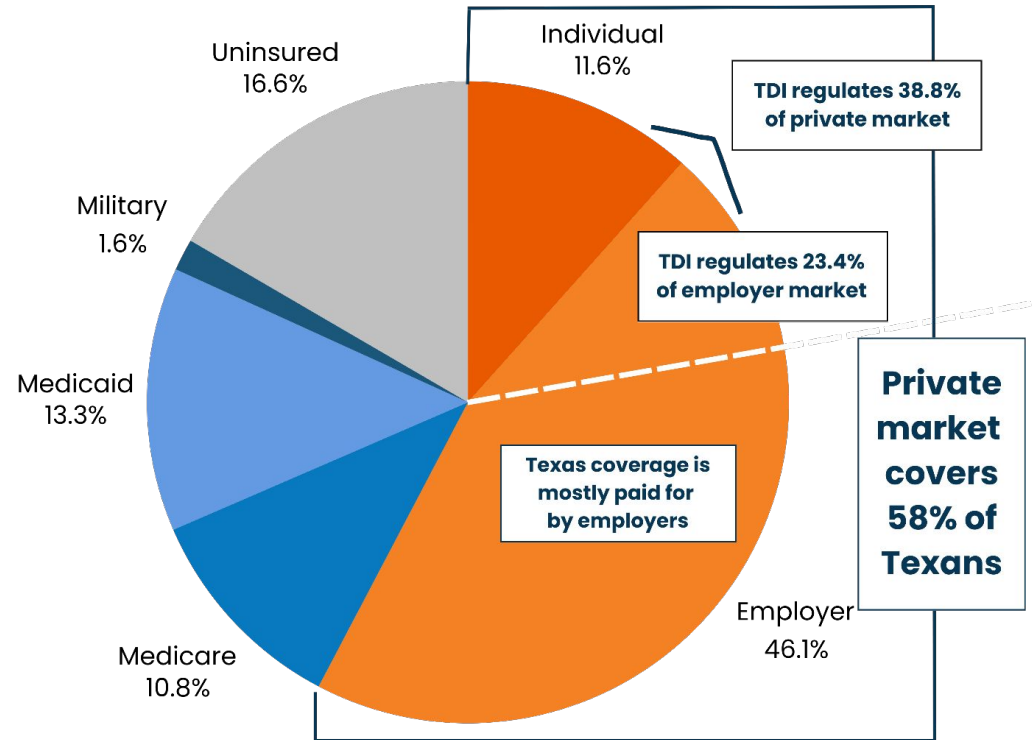
**87% of Texas employers say health care costs** are rising at an unsustainable rate and employees have steadily lost 5% in wages due to these costs.



**78% of Texas employers rank health care care costs** as one of the top issues affecting their business.

# Private Health Coverage Snapshot

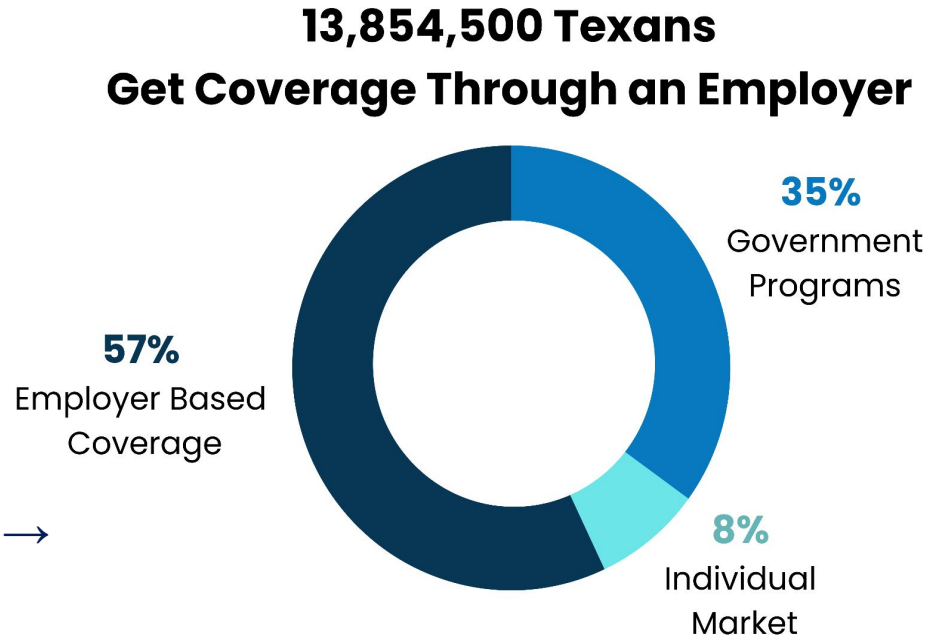
- **80%** of private market coverage is employer-based.
- **77%** of employer plans are self-funded (not regulated by TDI)
- **35%** of Texans are covered by a self-funded employer health plan, making it the single largest source of health plan coverage in the state.
- **Uninsured Texans** cite employment as the top reason for not having health coverage



# Employers: The Leading Source of Health Coverage

- Texas businesses make up the the foundation of health coverage in Texas with the most efficient path to benefits for families.
- Employers rely on health benefits to attract the best workers, so they cover the bulk of monthly premiums for the most extensive and comprehensive coverage around.
- 89% of all American workers have access to job-based health benefits.
- 50% of children in the US get health coverage through a parent's job.

**Majority of Texans are Covered at Work →**



Not Peer Reviewed

# ERISA 101

## Employee Retirement Income Security Act of 1974

September 9, 2024



## *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT*

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- President Ford signed ERISA into law in 1974
- It was a bipartisan bill – only a handful of members voted against it
- A provision was added in Conference Committee that significantly beefed up preemption of conflicting state laws



Conference report filed in House, H. Rept. 93-1280 and in the Senate, S. Rept. 93-1090

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# Why ERISA was enacted: More than just health benefits.

## Pre-ERISA

- Some employers misused employee pension funds, leaving plan participants without recourse
- Minimal requirements for employers to notify plan participants of their eligible benefits
- Minimal limitations, reductions, or terminations to plan benefits

## Post ERISA

- Plan funds and accrued benefits are protected (e.g., PBGC)
- Detailed notification of plan benefits and changes
- Annual reporting requirement (e.g., Form 5500)
- Substantive benefit mandates & rights (e.g., COBRA, WHCRA, etc.)
- Applies to both pension plans and Health & Welfare plans

## *SELF-INSURED V. FULLY INSURED ERISA PLANS: WHO PAYS FOR MEDICAL CARE?*

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### Self-Insured

- Employers directly pay for medical claims and fees out of current revenues

### Fully-Insured

- Employers pay a fixed premium to a third-party commercial insurance carrier that covers the medical claims

*There are 100 million people that are in self-insured ERISA health plans*



# ERISA Terminology

- **ERISA Preemption** prevents states from regulating ERISA plans.
  - However, state laws that have a general application or an indirect economic effect on ERISA plans are allowed.
- **Savings Clause:** state insurance laws (including those regulating banking and securities) are not preempted by ERISA.
- **Exceptions**
  - State laws regulating MEWAs (Multiple Employer Welfare Arrangement)
  - Hawaii Prepaid Health Care Act
  - Criminal laws
- **Results**
  - Insured plans are governed by both state insurance laws and ERISA
  - Self-insured plans are generally only governed by ERISA

# Impact on Employers

## Fiduciary Responsibility

- Discretionary authority or control over plan management
- Any authority or control over management of plan assets

## ERISA fiduciary duties:

- Act only in best interest of participants
- Act as a “prudent expert”
- Act exclusively to pay benefits and administrative costs of plan (i.e., not engage in self-dealing)
- Act in accordance with plan documents
- Hold employee contributions in trust
- Bonding requirements

# How ERISA Helps Employers

- Multi-state employers can offer consistent and clear benefits
- Consistent benefits ease plan administration and benefits
- Plan features and innovations to apply to all participants
- Equity in employee payroll contributions

# ERISA CHALLENGES

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## Pharmacy Benefits

### Post-Rutledge

- Oklahoma, Tennessee, New York, Florida, and New Jersey state laws create any-willing-pharmacy and cost-sharing practice prohibitions
- "Impermissible connection with" ERISA plans – direct impact on plan design



## Assessments and Spending Mandates

- Maryland – Retail Industry Leaders v. Fielder
- Golden Gate Hotel Association v. San Francisco
- ERIC v City of Seattle
- Maine



## Attempts to Apply Benefit Mandates

- Texas Insurance Law HB 2021
- Maryland Male Infertility Mandate



## Attempts to Force Self-Insured Plans to Participate in APCDs

- VT – Explicit application to self-insured plans preempted under *Gobeille*
- FL – APCD enacted in 2016, proponents attempting to use tax code to coerce ERISA plans to submit data
- IN – APCD rules directly conflict with *Gobeille*, may see legal action



## Attempts to use ERISA plans to bail out individual market plans via "reinsurance"

- Louisiana reinsurance legislation – [HB 472](#) 2018
  - Connecticut SB 210
  - Michigan SB 637
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# LEGISLATIVE CHANGES TO ERISA

Consolidated Omnibus  
Budget Reconciliation Act  
(COBRA)

Public Law 99-272  
1985



Newborns' and  
Mothers' Health  
Protection Act

Public Law 104-204  
1996



Women's Health  
and Cancer  
Rights Act

Public Law:  
105-277  
1998



The Genetic  
Information  
Nondiscrimination  
Act

Public Law 110-233  
2008



1996  
Health Insurance  
Portability and  
Accountability Act  
Public Law 104-191



1996  
Mental Health Parity Act  
Public Law 204



2008  
Mental Health Parity and  
Addiction Equity Act  
Public Law 110-343



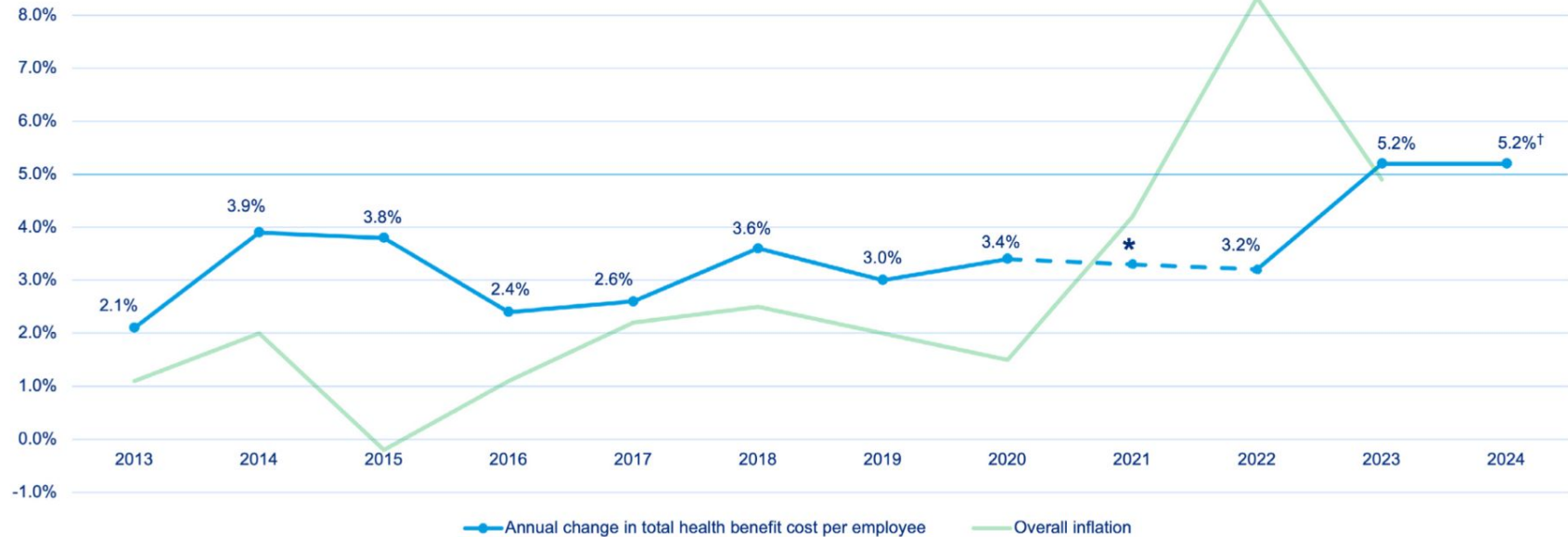
2010  
The Patient Protection and  
Affordable Care Act  
Public Law 111



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# What employers face 5%+ cost increases in 2023 and 2024

Change in total health benefit cost per employee among all employers, compared to CPI



Beginning in 2020, survey results are based on employers with 50 or more employees. \*The change in cost for 2021 was affected by disruption in healthcare utilization due to COVID and is not shown. †Projected  
Source: Mercer's National Survey of Employer-Sponsored Health Plans; Bureau of Labor Statistics, Consumer Price Index, U.S. City Average of Annual Inflation (April)



# How employers are addressing rising health care costs



## Offering benefits that matter

Employers are seeking to support varied workforce needs with inclusive and meaningful benefits. A new focus is preparing for the effects of extreme climate on workforce health.



## Finding network strategies that work

Employers are more willing to implement non-standard provider network strategies focused on cost, quality and affordability.



## Balancing economics and empathy

Employers seek to ensure benefits' long-term value creation through cost management strategies.

# New network structures gain traction—ERISA helps support

	Currently in place/planned for 2025	Considering for 2025 or 2026
<b>1 National carrier high-performance network</b> Typically, an overlay on a major carrier's broader PPO network	17%	25%
<b>2 Independent vendor high-performance network</b> Not including traditional HMOs	2%	11%
<b>3 Other high-performance network plan</b> Traditional HMO, regional health plan, reference-based pricing plan, etc.	20%	15%
<b>4 Variable copay plan</b> A plan in which copay amounts vary by individual providers and members can see the amounts prior to making an appointment	7%	18%

**36%** offer one of these non-traditional medical plans or will in 2025

**29%** are considering it

**35%** are not considering it

Employers with 500 or more employees

# Financial support for work – and living – expenses

Offering or will offer in 2025



## Financial wellness program

E.g., financial coaching, investment advice

68%



## Lifestyle account

For well-being activities, life needs and hobbies

15%



## Subsidized phone/internet

For remote working

21%



## Student loans

Refinancing assistance

13%



## Employer-provided or subsidized transportation

Including commuter cards

18%



## Identity protection/password programs

Employer-paid

13%



## Free/subsidized meals at work

17%



## Employer-paid legal services

Including virtual solutions

12%



## Stipend for home office set-up/supplies

16%



## Student loans

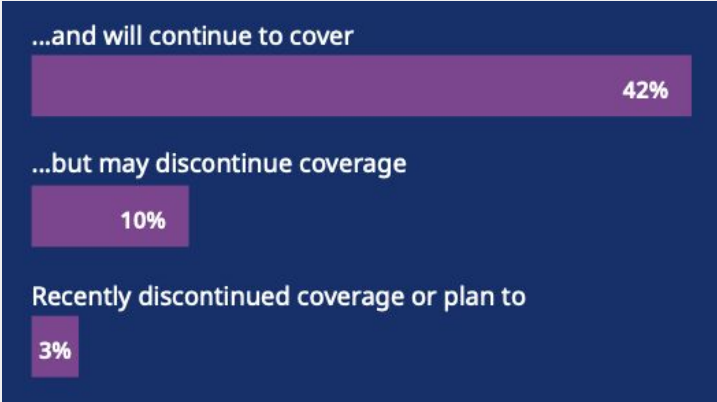
Contributing to loan repayment

10%

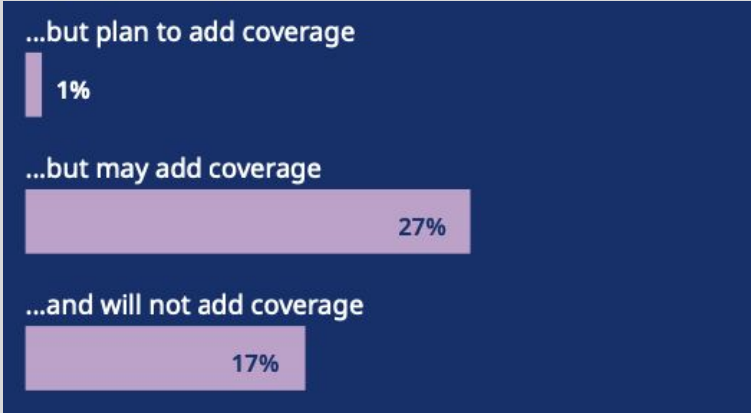
Employers with 500 or more employees

# Employers are more likely to add coverage for obesity medications (including GLP-1s) than to drop it

## Cover obesity medications:



## Don't cover obesity medications:

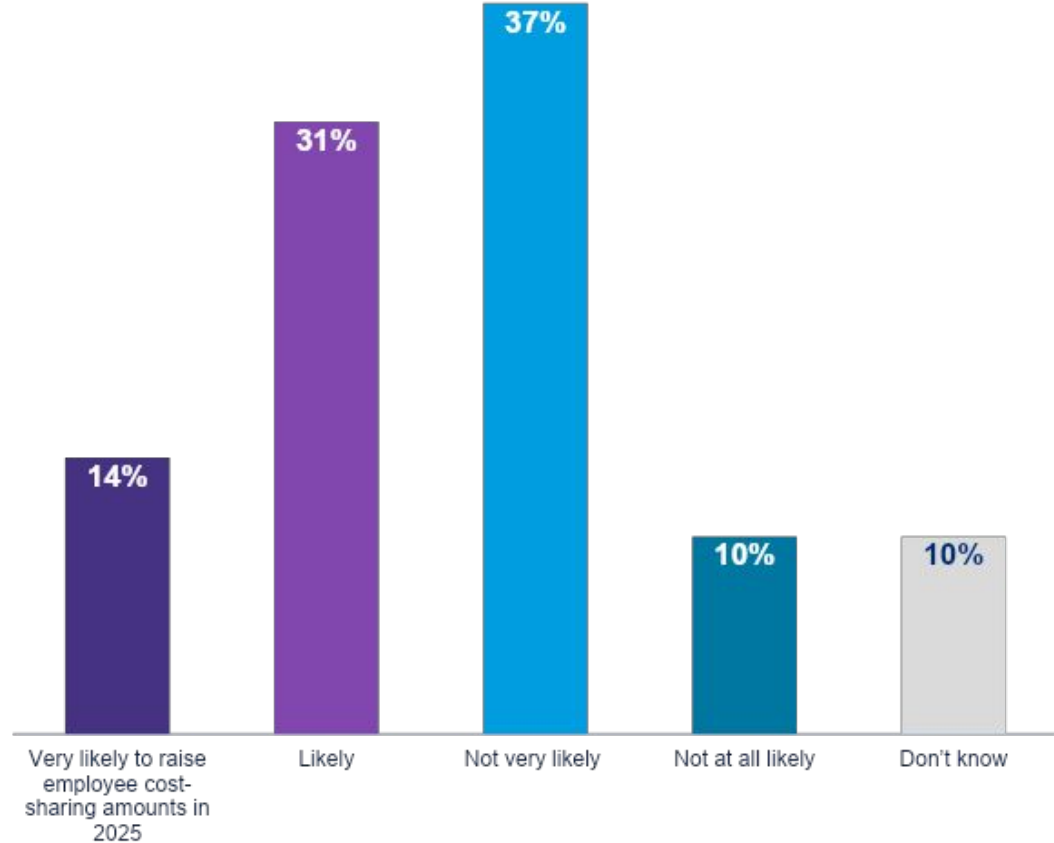


Employers with 500 or more employees

# With costs rising, some employers are considering plan design changes\* that would shift cost to employees in 2025, but more are trying to avoid this tactic

\*Raise out-of-pocket costs like deductibles, out-of-pocket maximums, copays, etc. in the largest medical plan

Employers with 500 or more employees



# CFO opinion: How much emphasis should be placed on each type of cost management strategy over the next three years?

Very strong emphasis   Strong emphasis   Some emphasis   Slight emphasis   No emphasis

Clinical management (greater monitoring and oversight of care)



Network strategies (smaller, high-performing hospital and physician networks)



Plan design changes (increased employee cost-sharing)







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ASSOCIATION OF  
**BUSINESS**

**THE TEXAS STATE CHAMBER**

**Glenn Hamer, President & CEO Texas  
Association of Business**

Representing Companies of Every Size and Industry.  
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(512) 477-6721



[info@txbiz.org](mailto:info@txbiz.org)



[txbiz.org](http://txbiz.org)



# Texas Employers are Struggling with Healthcare Costs: TAB 2022 Employer Survey

**87%** say that healthcare costs are rising at an unsustainable rate

**78%** rank healthcare costs as one of the top issues affecting their business

**77%** agree that employers should have more flexibility to contain costs

**75%** oppose mandates that interfere with how they design benefits for employees

# What Is a Mandate and Why Should You Care?

## Mandates Require Texas Employers and Individuals to:

- Pay for extra benefits & extra regulations above the Affordable Care Act
- Pay higher prices for medical services
- Accept more one-size-fits-all insurance coverage options

## Texas Lawmakers are Increasingly Filing and Passing New Mandates:

**88th Session (2023):** Over 110 mandates filed, 77 heard, and 16 became law.

**87th Session (2021):** Over 100 mandates filed, and 7 became law.

The House Insurance Committee sent 36 mandate bills to the Senate in the 88th and 30 in the 87th.

**What's worse?** The Legislature often exempts their own personal health coverage through ERS and other state-funded coverage because of the costs, but passes these costs on to other Texas employers.

**3rd in the nation:** Texas has more mandates above the Affordable Care Act than almost any state

**The result:** Texas employer pay more for health insurance and have less access to innovative coverage options such as value based care, mail order pharmacy and shopping incentives.

# The Mandate Threat is Expanding to ERISA

- **Employers Looking for Answers:** Employers, including small businesses are shifting to self-funded or level-funded plans to avoid state mandates' costs.
- **ERISA Mandate Threat:** State lawmakers are increasingly imposing costly mandates on employer-provided health plans, despite ERISA preemption.
- **Texas ERISA Threat:** Last session, special interest groups pushed SB 1137/HB 2021 to apply state pharmacy mandates to self-funded and level-funded ERISA plans.
- **Increased Employer Costs:** The proposal would restrict cost-saving benefit designs, like mail-order pharmacies, costing \$464M in the first year and \$5.4B over 10 years.
- **Texas Employers Successfully Advocated Against ERISA Mandates:** Employers and Chambers of Commerce advocated against these mandates, and the Legislature rejected the proposals, which died in committee.

February 21, 2023

Chairman Oliverson,

Thank you for your leadership. We are writing to express our opposition to HB 2021, which attempts to preempt the Employee Retirement Income Security Act (ERISA). While it is not the intention of the bill, this could negatively impact Texas employers' ability to offer affordable healthcare benefits, leading to increased costs for employees.

The core purpose of ERISA is to establish a consistent set of rules for employee benefit plans and provide clarity and certainty for both employers and employees. This consistency is particularly important for large employers that operate in multiple states as it ensures a uniform benefit package across our workforce. Federal law sets minimum standards, including reporting and disclosure requirements as well as fiduciary responsibility.

ERISA's broad preemption provision has been successful: 98% of Texas large employers provide comprehensive coverage to their employees. It is also worth noting that most large employers already provide more comprehensive coverage than plans sold in the state-regulated insurance market. Employer plans are tailored to the specific needs of their employees and offer greater benefits, such as access to top-tier providers and lower out-of-pocket costs.

In a recent survey, 87% of employers agreed that Texas businesses should stand together against legislation that increases the cost of employer-paid health care coverage. If this bill were to become law, it would increase prescription drug costs for millions of Texas employees. This would be costly for Texas employers, who would be forced to comply with a range of different state laws and regulations. It would also be confusing for employees, who may be subject to different benefit packages depending on where they work.

The business community looks forward to working with you and your fellow lawmakers to find ways to continually lower health care costs. Employers across Texas want the ability to choose quality, affordable health care and prescription options that best fit their businesses and employees.

Sincerely,

Glenn Hamer  
President & CEO  
Texas Association of Business

Justin Yancy  
President  
Texas Business Leadership  
Council

cc:  
Texas House of Representatives  
Texas Senate  
Office of Governor Greg Abbott

- **TAB letter sent 2/21/23 to Legislature in opposition to HB 2021.**
- *“If this bill were to become law, it would increase prescription drug costs for millions of Texas employees. This would be costly for Texas employers, who would be forced to comply with a range of different state laws and regulations.”*



April 24, 2023

To: Chairman and Members  
Texas Senate Health & Human Services Committee  
Subject: SB 1137

SB 1137 applies state-specific mandates to prescription drugs and devices that are currently covered under federal Employee Retirement Income Security Act of 1974 (ERISA) health insurance plans. As large employers and associations representing Texas' largest employers, we have serious concerns about any measure that erodes ERISA's protections and therefore respectfully oppose SB 1137.

The core purpose of ERISA is to create uniformity and continuity for employers managing benefits across multiple state lines. In the absence of ERISA, employers would be faced with either providing inequitable benefits or significantly reducing benefits due to the cost of complying with a patchwork system. Preservation of ERISA is paramount to our ability to provide uniform health insurance coverage to our employees, no matter where they live.

SB 1137 disrupts Texas business, leading to myriad unintended consequences, including:

- inequitable benefits to Texas employees, possibly including decreased benefits and higher premiums, deductibles, and out-of-pocket costs;
- increased complexity and administrative costs of compliance with a patchwork system;
- litigation costs; and
- making Texas less attractive as a place to do business for multi-state employers.

SB 1137 is a direct attempt to apply state law to self-insured ERISA plans and the benefits employers can offer to their employees. While the U.S. Supreme Court ruling in *Rutledge v. Pharmaceutical Care Management Association*, 141 S. Ct. 474 (2020) did address price setting under ERISA plans, the Court specifically stated that state legislation is pre-empted when it interferes with plan design and administration. **SB 1137 goes beyond price setting and interferes with plan design and administration by imposing administrative requirements and mandating that self-funded ERISA plans provide specific benefits.**

As always, we stand ready and willing to work with the Legislature to develop strong public policy that furthers the goals of a strong Texas economy, including protecting policies that improve access to affordable healthcare for Texas employees. We ask that you stand with the business community and preserve ERISA's protections.



# Texas Employers Pushed back Successfully Against ERISA Mandate

- **SB 1137 & HB 2021** would have created several new mandates on self-funded health plans including.
- **Employer's Responded:** "SB 1137 disrupts Texas business, leading to myriad unintended consequences, including making Texas less attractive as a place to do business for multi-state employers."



# TAB Supported Solutions to Address the Rise in Mandates

- #1 No New Mandates:** The legislature has steadily passed costly healthcare mandates on employers. It's time for a break. Next session, we need a complete moratorium on new employer healthcare mandates.
- #2 Private Market Mandate Costs Should be Transparent:** A majority of states estimate the cost of mandates before hearing and passing bills so lawmakers know the actual impact on businesses and families (mandate fiscal note).
- #3 Review Existing Limitations that Prevent Employer Flexibility:** Employers want more flexibility to offer innovative benefits that reward high value care and encourage patients to be smart shoppers. State regulations are standing in the way.
- #4 More Choice for Employers:** Build a mandate-lite coverage option. Businesses want alternative coverage choices that allow them to select the plan designs and benefits that adapt to their needs, avoid over regulation, and are priced at a cost they can afford.
- #5 No Special Exemptions for Lawmakers:** Texas lawmakers shouldn't pass mandates that don't apply to their own personal health insurance and state health plans (ERS and TRS).
- #6 Protect ERISA Employer Flexibility:** Employers are leading with innovation and Texas should reject attempts to regulate self-funded ERISA employers.

# Lawmakers lack info on the cost of mandates and regulations on Texas employers and families.

At least 29 states have a process to estimate the cost of healthcare mandates so lawmakers are fully informed before adding costs to businesses and families.

**In Texas, lawmakers estimate the cost to their own coverage and other state paid plans but never get the actual cost to businesses and families.**



**An effective mandate fiscal note** will equip lawmakers with the data they need before voting.



**Texas lawmakers should be fully informed** about the cost of healthcare mandates on employers before passage into law.



**Texas should never pass a mandate** if it increases the cost of coverage.