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SENATE MEMORIAL 5

**44TH LEGISLATURE - STATE OF NEW MEXICO - 2ND SECOND SESSION, 2000**

INTRODUCED BY

Dede Feldman

A MEMORIAL

REQUESTING THE CONGRESS OF THE UNITED STATES TO AMEND THE  
EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 TO GRANT  
AUTHORITY TO ALL INDIVIDUAL STATES TO MONITOR AND REGULATE  
SELF-FUNDED EMPLOYER-BASED HEALTH PLANS IN ORDER TO PROVIDE  
GREATER CONSUMER PROTECTION AND EFFECT HEALTH CARE REFORM.

WHEREAS, in 1945, the United States congress established  
a framework whereby responsibility for regulating insurance  
and the insurance industry was left largely to the states;  
and

WHEREAS, the United States congress passed the Employee  
Retirement Income Security Act of 1974 (ERISA), which altered  
state control by creating a federal framework for regulating  
employer-based pension and welfare benefit programs,  
including health plans; and

WHEREAS, the provisions of the Employee Retirement  
Income Security Act of 1974 preempt states from directly

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1 regulating most employer-based health plans, which are not  
2 deemed to be "insurance" for the purposes of federal laws;  
3 and

4 WHEREAS, over the past twenty-four years, state  
5 governments have gradually come to realize that the Employee  
6 Retirement Income Security Act of 1974 is an impediment to  
7 ensuring adequate consumer protections for all individuals  
8 with employer-based health care coverage and to enacting  
9 administrative simplification and cost-reduction reforms that  
10 could improve the efficiency and equity of their health care  
11 markets; and

12 WHEREAS, available data suggest that self-funding of  
13 employer-based health plans is increasing at a significant  
14 rate, both among large and small businesses; and

15 WHEREAS, between 1989 and 1993, the United States  
16 general accounting office estimated that the number of self-  
17 funded plan enrollees increased by about six million  
18 individuals; and

19 WHEREAS, approximately forty to fifty percent of  
20 employer-based health plans are presently self-funded by  
21 employers who retain most or all of the financial risk for  
22 their respective health plans; and

23 WHEREAS, as self-funding of health plans has grown,  
24 states have lost regulatory oversight over this growing  
25 portion of the health market; and

WHEREAS, given the improbability of federal reforms to  
achieve universal health coverage in the near future, many

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1 state legislatures are seeking an active role in expanding  
2 the number of individuals covered by an insurance plan and in  
3 controlling health care costs and regulating abuses; and

4 WHEREAS, the preemption provisions of the Employee  
5 Retirement Income Security Act of 1974 are an obstacle to the  
6 states' adopting a wide range of health care reform  
7 strategies; and

8 WHEREAS, employers are increasingly adopting funding  
9 methods that blur the distinction between self-funded and  
10 fully insured health plans, including more extensive use of  
11 stop-loss coverage and risk-sharing arrangements with managed  
12 care organizations; and

13 WHEREAS, these innovative funding methods have so  
14 blurred the distinction between self-funded and fully insured  
15 health plans that many experts argue that there is no real  
16 distinction at all; and

17 WHEREAS, the states' inability to protect consumers  
18 enrolled in self-funded health plans from employers or plans  
19 that fail to provide the consumers' anticipated level of  
20 health care is gradually eroding the public's confidence in  
21 government, even as self-funded health plans are afforded an  
22 unfair advantage over traditional health insurance providers  
23 due to a lack of state or federal accountability, regulation  
24 or remedy for the individual members of ERISA plans  
25 confronting benefit denials; and

WHEREAS, courts have narrowly interpreted ERISA's remedy  
provisions and broadly interpreted ERISA's preemption

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1 provisions, thereby creating a substantial economic incentive  
2 for plan administration to deny medically necessary benefits  
3 legitimately covered under ERISA plans; and

4 WHEREAS, the time has now come for states to  
5 aggressively seek changes in the Employee Retirement Income  
6 Security Act of 1974 to give them more flexibility in  
7 regulating health plans at the state level, to increase  
8 access to health care and to lower health costs;

9 NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF THE  
10 STATE OF NEW MEXICO that the United States congress be  
11 requested to amend the Employee Retirement Income Security  
12 Act of 1974 to grant authority to all individual states to  
13 monitor and regulate self-funded employer-based health plans  
14 in the interest of providing greater consumer protection and  
15 effecting significant health care reforms at the state level  
16 through New Mexico's superintendent of insurance and attorney  
17 general; and

18 BE IT FURTHER RESOLVED that the authority granted to all  
19 individual states to monitor and regulate self-funded  
20 employer-based health plans allow recovery of benefits due  
21 plan participants, recovery from the fiduciary compensatory  
22 damages caused by the fiduciary's failure to pay benefits due  
23 under the plan and enforcement of the plan participants'  
24 rights under the terms of the plan or authorize timely  
25 assurance for payment and clarification of the plan  
participants' rights to future benefits under the terms of  
the plan; and

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1 BE IT FURTHER RESOLVED that the United States department  
2 of labor be requested to refer complaints to New Mexico's  
3 superintendent of insurance and attorney general for  
4 regulation and timely enforcement; and

5 BE IT FURTHER RESOLVED that the United State congress be  
6 requested to regulate ERISA plans in direct accordance with  
7 the plan benefit language; and

8 BE IT FURTHER RESOLVED that corporations with employees  
9 in New Mexico be requested to have their health plans  
10 regulated by New Mexico's superintendent of insurance and  
11 attorney general in cooperation with the labor department;  
12 and

13 BE IT FURTHER RESOLVED that New Mexico employers be  
14 immune from protection with an ERISA claim and shall have the  
15 right to remain self-funded without risk of liability through  
16 ERISA plans; and

17 BE IT FURTHER RESOLVED that each state legislative body  
18 of the United States be requested to enact this memorial or  
19 one similar to it as a show of solidarity in petitioning the  
20 federal government for greater state authority in regulating  
21 self-funded employer-based health plans;

22 BE IT FURTHER RESOLVED that copies of this memorial be  
23 transmitted to the president of the United States, the  
24 secretary of the United States department of labor, the  
25 speaker and clerk of the United States house of  
representatives, the president pro tempore and the secretary  
of the United States senate, each member of the New Mexico

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1 legislature, New Mexico's superintendent of insurance and  
2 attorney general and the presiding officer of each house and  
3 senate in every state's legislative body in the United  
4 States.

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