

**CHARLES SCHWERTNER**

TEXAS SENATE PRESIDENT PRO TEMPORE

STATE SENATOR • DISTRICT 5

COMMITTEES: BUSINESS AND COMMERCE, CHAIR • FINANCE • STATE AFFAIRS

Dear Attorney General Paxton:

I write seeking an opinion in regard to the following two questions:

1. Are HB 1763¹ and HB 1919² enforceable against an ERISA³ health benefit plan issuer and a pharmacy benefit manager administering the pharmacy benefits of such ERISA health benefit plan?
2. Are HB 1763 and HB 1919 enforceable against a health benefit plan issuer and a pharmacy benefit manager administering the pharmacy benefits of such health benefit plan where the health benefit plan is domiciled in a United States jurisdiction outside of Texas and the health benefit plan provides coverage to Texas residents and uses a pharmacy benefit manager that directly contracts with a network of providers including Texas pharmacy providers?

It has come to my attention that HB 1763 and HB 1919 are not being enforced against health benefit plans and pharmacy benefit plans where the plan is based outside of Texas, even where the patients and pharmacies impacted are located in Texas.

HB 1763 explicitly applies to health benefit plans that provide benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness. TEX. INS. CODE §1369.602(b). The only limitation on this broad statement of applicability is with respect to workers' compensation insurance policies or other forms of medical benefits under Title 5 of the Labor Code. TEX. INS. CODE §1369.602(c).

Similarly, HB 1919 explicitly broadly applies to health plans that provide benefits for medical, surgical, or other treatment expenses incurred as a result of a health condition, a mental health condition, an accident, sickness, or substance abuse except for a limited number of exceptions. TEX. INS. CODE §1369.551(2) (referencing TEX. INS. CODE §1369.251(3)) and §1369.552.

Notably, the requirements and prohibitions of HB 1763 and HB 1919, apply specifically to a "pharmacy benefit manager" equally but independently from the requirements and prohibitions imposed on a "health benefit plan." *See, e.g.*, TEX. INS. CODE §§1369.553-55 and 1369.603-609.

¹ Acts 2021, 87th Leg., R.S., ch. 142, §1 (H.B. 1763) (codified at TEX. INS. CODE §§1369.601-610) (hereafter "HB 1763").

² Acts 2021, 87th Leg., R.S., ch. 1012, §1 (H.B. 1919) (codified at TEX. INS. CODE §§1369.551-555) (hereafter "HB 1919").

³ Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* (hereafter "ERISA").

HB 1763 and HB 1919 were both enacted in 2021 to reform various practices concerning the relationship between pharmacy benefit managers (“PBM”) and network providers. Both HB 1763 and HB 1919 apply broadly to health benefit plans that provide benefits for medical expenses as a result of a health condition, accident or sickness. Neither expressly exclude ERISA plans from their scope. As a result, ERISA plans appear to fall within their scope. Therefore, barring some specific principle of federal preemption, both HB 1763 and HB 1919 should be enforceable against an ERISA health benefit plan issuer or a pharmacy benefit manager administering the pharmacy benefits of such ERISA health benefit plan.

However, I understand that some testimony has been made before the Texas Legislature since the passage of HB 1763 and HB 1919 that has called into question their enforceability with respect to ERISA plans, including those domiciled in states outside of Texas. Therefore, an opinion of the Attorney General on the questions presented will provide clarity in the enforceability of these laws.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Schwertner". The signature is written in a cursive, flowing style.

Senator Charles Schwertner

Chair, Senate Business and Commerce