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17 UNITED STATES DISTRICT COURT
18 EASTERN DISTRICT OF WASHINGTON

19 UNITED STATES OF AMERICA,
20
21 Plaintiff,
22 v.

No.

23 STATE OF WASHINGTON; JAY
24 INSLEE, in his official capacity as
25 Governor of the State of Washington;
26 WASHINGTON STATE
27 DEPARTMENT OF LABOR &
28 INDUSTRIES; JOEL SACKS, in his
official capacity as Director of the
Washington State Department of Labor &
Industries,

COMPLAINT

Defendants.

Plaintiff the United States of America alleges as follows:

INTRODUCTION

- 1
2 1. The State of Washington (“State” or “Washington”) has enacted a workers’
3 compensation law, entitled “Hanford Site Employees—Occupational
4 Disease Presumption,” or Washington Substitute House Bill 1723 (“HB
5 1723”), attached hereto as Ex. A, that impermissibly singles out and
6 discriminates against the Federal Government and its contractors, purports to
7 directly regulate the Federal Government, and imposes significant burdens
8 on the Federal Government and its contractors without imposing them on
9 other employers in the State, all in violation of the Supremacy Clause of the
10 U.S. Constitution. This action seeks to enjoin implementation of this
11 improper statute and have it declared invalid.
- 12 2. The U.S. Department of Energy (“DOE”) is responsible for the remediation
13 of the environmental legacy of the United States’ production of nuclear
14 weapons, including that of its chief plutonium production facility—the
15 Hanford Nuclear Reservation (“Hanford”) in southeast Washington, which
16 played a critical role in the United States’ national defense from World War
17 II through the end of the Cold War. Nearly all of Hanford is owned by the
18 Federal Government.
- 19 3. Hanford’s large-scale production of critical national defense materials for
20 the Federal Government generated a significant amount of radioactive and
21 hazardous chemical wastes, which are now the focus of ongoing cleanup
22 work that is unprecedented in its scale and complexity.
- 23 4. DOE’s top priority in conducting its cleanup operations at Hanford is
24 ensuring the health and safety of its federal and contractor workforce.
25 Protecting workers includes ensuring that any worker who is injured in the
26 course of his or her employment or who falls ill because of such
27 employment is fully and expeditiously compensated. DOE is firmly
28 committed to, and spends significant resources implementing, its worker

1 safety and workers' compensation programs at Hanford. The workers'
2 compensation program for DOE's federal contractor workforce at Hanford
3 operates pursuant to the Washington Industrial Insurance Act ("WIIA").

4 5. HB 1723 interferes with these ongoing federal operations by fundamentally
5 changing how the WIIA applies to federally owned and operated portions of
6 Hanford but not to anywhere else in the State. Specifically, the law creates a
7 legal presumption that past, current, and future "United States [D]epartment
8 of [E]nergy Hanford site workers," as defined under the law, are entitled to
9 workers' compensation benefits if they develop certain diseases or
10 conditions without having to demonstrate, as the WIIA otherwise requires,
11 that their conditions were more likely than not caused by their employment
12 at Hanford.

13 6. The resulting heightened liability for workers' compensation, and attendant
14 costs, that HB 1723 imposes on DOE and its contractors are not imposed on
15 other employers elsewhere at Hanford or elsewhere in the State. This
16 impermissible discrimination against the Federal Government and its
17 contractors and purported direct regulation of the Federal Government
18 violate the Supremacy Clause.

19 7. The United States thus brings this action against Washington, the Governor
20 of Washington, the Washington Department of Labor and Industries
21 ("L&I"), and the Director of L&I (collectively, "Defendants") for a
22 judgment declaring that HB 1723 is invalid under the Supremacy Clause,
23 and for an injunction against its enforcement.

JURISDICTION

1 8. This is a civil action brought by the United States under the Constitution of
2 the United States, U.S. Const. art. VI, cl. 2, seeking declaratory and
3 injunctive relief under 28 U.S.C. §§ 2201 and 2201, and Federal Rules of
4 Civil Procedure 57 and 65. This Court has subject matter jurisdiction
5 pursuant to 28 U.S.C. §§ 1331 and 1345.

VENUE

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7
8 9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because
9 Hanford is located within this District.

PARTIES

10
11 10. Plaintiff is the United States of America, suing on its own behalf and on
12 behalf of DOE.

13 11. DOE is a federal executive department charged by Congress with
14 completing the safe cleanup of the environmental legacy brought about from
15 five decades of nuclear weapons development at Hanford.

16 12. Defendant Washington is a State of the United States.

17 13. Defendant Jay Inslee is the Governor of Washington. He is sued in his
18 official capacity.

19 14. Defendant L&I is the state agency responsible for implementing the WIIA,
20 Revised Code of Washington (“RCW”) Title 51.

21 15. Defendant Joel Sacks is the Director of L&I. He is sued in his official
22 capacity.

CONSTITUTIONAL AND STATUTORY BACKGROUND

The Supremacy Clause of the U.S. Constitution

23
24
25 16. The Supremacy Clause of the U.S. Constitution provides: “This
26 Constitution, and the Laws of the United States which shall be made in
27 Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges
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1 in every State shall be bound thereby, any Thing in the Constitution or Laws
2 of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

3 17. The doctrine of intergovernmental immunity holds that “[u]nder the
4 Supremacy Clause, ‘the activities of the Federal Government are free from
5 regulation by any state.’” *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839
6 (9th Cir. 2014) (quoting *Mayo v. United States*, 319 US 441, 445 (1943)). A
7 state law is invalid if it “regulate[s] the United States directly,” or if it
8 “discriminate[s] against the Federal Government or those with whom it
9 deals,” that is, if it “treats someone else better than it treats the government.”
10 *Boeing*, 768 F.3d at 839, 842.

11 **The WIIA**

12 18. The WIIA is the State’s statutory regime for industrial insurance. It
13 provides that a worker who sustains an injury or contracts an “occupational
14 disease,” will be compensated through the payment of certain benefits. An
15 “occupational disease” is defined as “such disease or infection as arises
16 naturally and proximately out of employment under the mandatory or
17 elective adoption provisions of this title.” RCW 51.08.140.

18 19. To be eligible to receive benefits under the WIIA, a worker generally has
19 the burden of establishing that (1) he or she has a physical condition and (2)
20 there is a “causal connection between” his or her physical condition and
21 employment based on competent medical testimony which shows that the
22 disease is probably, as opposed to possibly, caused by the employment.
23 *Dennis v. Dep’t of Labor & Indus. of State of Wash.*, 109 Wash.2d 467, 477
24 (Wash. 1987). A claim for an “occupational disease” is generally subject to
25 a two-year statute of limitations. RCW 51.28.055.

26 20. The WIIA requires that all employers covered by the Act provide workers’
27 compensation coverage. Employers may do so by participating in the
28

1 Washington State Fund (“State Fund”), which is an insurance pool funded
2 by employer premiums and managed and administered by L&I, or
3 employers may do so by qualifying as a self-insurer. RCW 51.14.010;
4 51.14.030. A self-insured employer provides workers compensation benefits
5 directly to its employees rather than through the State Fund. *See* RCW
6 51.08.173.

7 **Workers’ Compensation at Hanford**

8 21. Federal law provides for a limited waiver of the Federal Government’s
9 intergovernmental immunity for state workers’ compensation laws, such that
10 States may enforce their workers’ compensation laws against private
11 employers working on federal land, “in the same way and to the same extent
12 as if the premises were under the exclusive jurisdiction of the State.” 40
13 U.S.C. § 3172. Non-federal employees at Hanford consequently receive
14 workers’ compensation coverage through the WIIA.¹

15 22. As a certified self-insurer under the WIIA, DOE provides workers’
16 compensation coverage directly to the majority of federal contractor
17 employees at Hanford. Specifically, pursuant to a Memorandum of
18 Understanding between DOE and L&I (“MOU”), DOE serves as the
19 “statutory employer” for the employees of certain Hanford contractors,
20 including six of its current prime contractors and seven of their
21 subcontractors. Together these contractors employ the majority of the
22 approximately 10,000 current employees of DOE contractors at Hanford.
23 The MOU also covers the employees of sixty-one contractors and
24

25
26 ¹ Workers’ compensation claims for federal employees are administered
27 pursuant to the Federal Employees’ Compensation Act (“FECA”, 5 U.S.C. §
28 8103 *et seq.*). FECA does not cover non-federal employees at Hanford.

1 subcontractors that previously performed work for the Federal Government
2 at Hanford.

3 23. DOE thus has assumed responsibility for providing workers' compensation
4 coverage for these contractor employees. L&I provides oversight of the
5 self-insurance process and retains final authority as to the allowance of their
6 workers' compensation claims. When L&I approves a claim of a contractor
7 employee covered by the MOU, DOE pays the benefits.

8 24. Hanford contractors not covered by the MOU provide workers'
9 compensation coverage to their employees either through the State Fund or
10 as self-insurers. Because workers' compensation costs are considered
11 "allowable" under federal acquisition regulations – which are incorporated
12 into DOE contracts – these contractors will likely be reimbursed by DOE for
13 such costs.

14 **Workers' Compensation Claims Processing at Hanford**

15 25. DOE contracts with a third-party administrator – currently Penser North
16 America, Inc. – that manages workers' compensation claims on behalf of
17 DOE, and pays benefits for contractors covered under the MOU.

18 26. Penser reviews a submitted claim, gathers relevant employment and medical
19 information, and recommends that L&I either approve or deny the claim.
20 L&I then issues an order approving or denying the claim. Penser
21 administers approved claims and pays appropriate benefits consistent with
22 the L&I order. Either the worker or DOE may contest an L&I order through
23 the administrative appeals process, including further review by L&I and the
24 Washington Board of Industrial Insurance Appeals, subject to judicial
25 review in state court.

26 27. Since 2009, DOE has paid nearly \$116 million in workers' compensation
27 benefits to employees of Hanford contractors covered by the MOU.
28

HB 1723

1
2 28. HB 1723 was signed into law by Defendant Inslee on March 7, 2018, and
3 became effective, as a matter of State law, on June 7, 2018. It has been
4 codified at RCW 51.32.187.

5 29. HB 1723 amends the WIIA by creating a “prima facie presumption” for
6 “[D]epartment of [E]nergy Hanford site workers” that certain defined
7 illnesses are “occupational diseases” within the meaning of RCW 51.08.140.
8 HB 1723 Sec. 1.(2)(a).

9 30. “United States [D]epartment of [E]nergy Hanford site workers” are defined
10 as “any person, including a contractor or subcontractor, who was engaged in
11 the performance of work, either directly or indirectly, for the United States,
12 regarding projects and contracts at the Hanford nuclear site and who worked
13 on the site at the two hundred east, two hundred west, three hundred area,
14 environmental restoration disposal facility site, central plateau, or the river
15 corridor locations for at least one eight-hour shift while covered under this
16 title.” HB 1723 Sec. 1.(1)(b). The vast majority of federal contractor
17 employees at Hanford have worked, and continue to work, in these areas.²

18 31. HB 1723 facially applies to federally owned and operated portions of
19 Hanford, specifically excluding leased land and state-owned land located
20 within Hanford’s boundaries.

21 32. Any covered Hanford worker—past, present, or future; living or deceased—
22 who worked a single eight-hour shift in a covered area, and thereafter suffers
23 from one of potentially hundreds of covered illnesses, can avail themselves
24 of HB 1723’s presumption of entitlement to workers’ compensation.
25

26
27 ² A detailed map of Hanford, and a second map illustrating the areas referenced
28 in the law, are attached as Exhibits B and C.

- 1 33. HB 1723 eliminates the two-year statute of limitations on claims contained
2 in RCW 51.28.05 because the presumption extends to all workers'
3 compensation claims filed after June 7, 2018, "without regard to the date of
4 last injurious exposure or claim filing," and also "extends to an applicable ...
5 site worker following termination of service for the lifetime of that
6 individual." HB 1723 Sec. 1.(5)(c), (a). "A worker or the survivor of a
7 worker who has died as a result of one of the [covered] conditions or
8 diseases..., and whose claim was denied by order of [L&I], the board of
9 industrial insurance appeals, or a court, can file a new claim for the same
10 exposure and contended condition or disease." HB 1723 Sec. 1.(5)(b).
- 11 34. HB 1723's covered illnesses include common and broadly defined ailments,
12 such as "respiratory disease" and "neurological disease," as well as "[a]ny
13 heart problems, experienced within seventy-two hours of exposure to fumes,
14 toxic substances, or chemicals at the site;" "[c]ancer, subject to" certain
15 limitations defined elsewhere in the law; and "[b]eryllium sensitization, and
16 acute and chronic beryllium disease." HB 1723 Sec. 1.(3), (4).
- 17 35. The presumption in HB 1723 may be rebutted only "by clear and
18 convincing evidence," including "use of tobacco products, physical fitness
19 and weight, lifestyle, hereditary factors, and exposure from other
20 employment or nonemployment activities." HB 1723 Sec. 1.(2)(b).
- 21 36. If a final decision allowing a claim for benefits under the presumption is
22 appealed and upheld, the board or court "shall order that all reasonable costs
23 of appeal, including attorneys' fees and witness fees, be paid to the worker
24 or his or her beneficiary by the opposing party." HB 1723 Sec. 1.(6)(a), (b).

25 **Discriminatory Scope of HB 1723**

- 26 37. HB 1723 discriminates on its face against the Federal Government and
27 those with whom it deals, because the law only applies to the federally
28

1 owned and operated portions of Hanford, excluding on-site areas leased to
2 non-federal entities, and to “United States [D]epartment of [E]nergy
3 Hanford site workers.”

4 38. HB 1723 also discriminates against the Federal Government because it
5 subjects DOE’s contractors at Hanford to significantly heightened workers’
6 compensation liability not imposed on any other employers in the State.
7 DOE will bear the majority of the costs from this heightened liability,
8 including for ailments not demonstrated to have resulted from employment
9 at Hanford.

10 39. HB 1723 discriminates against the Federal Government and its contractors
11 because other employers in the State whose workers conduct the same jobs
12 as Hanford employees are not subject to the presumption, and because other
13 employers that operate at Hanford, even in the areas covered by the law, are
14 not subject to the presumption.

15 **Direct Regulation of DOE**

16 40. By imposing on DOE a clear-and-convincing standard of proof to overcome
17 the presumption, HB 1723 directly regulates the Federal Government by
18 effectively requiring DOE to cover certain ailments under the WIIA,
19 including those commonly occurring in the general population, whether or
20 not those ailments were caused by employment at Hanford.

21 41. That burden is compounded by HB 1723’s seemingly indefinite coverage
22 period. The presumption allows any past or present Hanford worker, or the
23 survivor of a deceased worker, to refile a claim that was previously denied.

24 42. HB 1723 thereby imposes significant costs on DOE and its contractors to
25 process and manage the additional claims submitted under HB 1723.

CLAIMS FOR RELIEF

Violation of Intergovernmental Immunity

Discrimination

43. The United States incorporates by reference the allegations in Paragraphs 1 to 42.

44. HB 1723 discriminates against the Federal Government and those with whom it deals because it singles out DOE, its contractors, and the federally owned and operated portions of Hanford for a substantially more burdensome and costly workers' compensation scheme than is generally applicable to employers in the State. Specifically, HB 1723 imposes enhanced liability for workers' compensation claims, and its attendant significant compliance costs, exclusively on DOE and its contractors notwithstanding that other employers operate in the same physical areas at Hanford, and that employees throughout the State conduct many of the same jobs as those conducted in the covered areas.

45. HB 1723's discrimination violates the Federal Government's intergovernmental immunity guaranteed by the Supremacy Clause.

Violation of Intergovernmental Immunity

Direct Regulation

46. The United States incorporates by reference the allegations in Paragraphs 1 to 45.

47. HB 1723 directly regulates the Federal Government by imposing unique workers' compensation obligations on DOE not caused by employment at Hanford, and imposing their attendant significant compliance costs.

48. HB 1723's direct regulation of the Federal Government violates the intergovernmental immunity guaranteed by the Supremacy Clause.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff United States of America prays that the Court:

- (a) Declare, pursuant to 28 U.S.C § 2201, that HB 1723 is invalid under the Supremacy Clause of the United States Constitution, both on its face and as applied to the Federal Government and those with whom it deals;
- (b) Permanently enjoin enforcement of HB 1723 against the Federal Government and those with whom it deals, pursuant to 28 U.S.C § 2202, and Federal Rules of Civil Procedure 57 and 65;
- (c) Award the Federal Government its costs of suit; and
- (d) Order such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED: December 10, 2018

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