

## State PBM Legislation Impacting ERISA Self-Funded Group Health Plans

State legislatures have increasingly regulated Pharmacy Benefit Managers (PBMs) in the wake of *Rutledge v. Pharmaceutical Care Management Association*,<sup>1</sup> a 2020 Supreme Court decision holding that ERISA did not prevent Arkansas from requiring PBMs to reimburse pharmacies at a rate equal to or greater than a pharmacy's acquisition cost. More than half of the states have enacted laws regulating PBMs. Common provisions impacting ERISA plans include:

- *Prohibitions on Spread Pricing* – Prohibiting PBMs from charging a health plan more for a drug than the amount the PBM reimburses the pharmacy.
- *Prohibitions on Pharmacy Gag Clauses* – Prohibiting PBMs from contractually preventing a pharmacy from disclosing certain information to a patient (e.g., the existence of lower-cost alternatives).
- *Prohibitions on Discrimination Against Non-affiliated Pharmacies* – Prohibiting PBMs from imposing stricter contractual terms on non-affiliated pharmacies.
- *Maximum Allowable Cost (MAC) Requirements* – Requiring PBMs to update MAC schedules within a certain period or provide pharmacy the sources utilized to determine MAC.

Although *Rutledge* held that ERISA did not preempt the Arkansas law, the Tenth Circuit recently held that it did preempt an Oklahoma PBM law in *Pharmaceutical Care Management Association v. Mulready*.<sup>2</sup> There, the court distinguished *Rutledge* and held that ERISA preempts four provisions of an Oklahoma PBM law due to its impact on ERISA plan design. First, the “Access Standards” provision dictated plans’ pharmacy network designs by requiring PBMs serving rural employees to include a certain number of brick-and-mortar pharmacies in their networks. Second, the “Any Willing Provider” provision required the admission of any pharmacy into a PBM’s network if the pharmacy was willing and able to meet the conditions of participation. Third, the “Discount Prohibition” prohibited PBMs from encouraging participants to use in-network pharmacies by offering cost-sharing discounts, like reduced co-pays. The court labeled these three network restrictions “quintessential state laws that mandate [ERISA plan] benefit structures” that together “effectively abolish the two-tiered network structure, eliminate any reason for plans to employ mail-order or specialty pharmacies, and oblige PBMs to embrace every pharmacy into the fold.” The court also struck down the “Probation Prohibition,” which prevented PBM networks from excluding a pharmacy due to the probationary status of one of its pharmacists and thereby limited a plan’s ability to “maintain[] quality-assurance standards” in its network.

The Tenth Circuit’s opinion in *Mulready* suggests a dividing line between permissible PBM regulation and ERISA-preempted legislation: the Arkansas law in *Rutledge* indirectly increased costs for plans, while the Oklahoma law in *Mulready* directly affected network design, “govern[ing] a central matter of plan administration.” Following its decision in *Mulready*, the court remanded the case to the district court.

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<sup>1</sup> *Rutledge v. Pharmaceutical Care Management Ass’n*, 592 U.S. 80 (2020).

<sup>2</sup> *Pharmaceutical Care Management Ass’n v. Mulready*, 78 F.4th 1183 (10th Cir. 2023).

Given the increasing state (and federal<sup>3</sup>) legislation and the uncertain boundaries of ERISA preemption, plan sponsors and service providers should keep a close eye on legislation in this area.

**From all of us here at MMPL, your employee benefits law firm.**

*Not intended as legal advice.*

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<sup>3</sup> Multiple U.S. senators have introduced legislation aimed at regulating PBMs. *See, e.g.*, S.127 - 118th Congress (2023-2024): Pharmacy Benefit Manager Transparency Act of 2023, S.127, 118th Cong. (2023), *available at* <https://www.congress.gov/bill/118th-congress/senate-bill/127>; S.1339 - 118th Congress (2023-2024): Pharmacy Benefit Manager Reform Act, S.1339, 118th Cong. (2023), *available at* <https://www.congress.gov/bill/118th-congress/senate-bill/1339>.