

# State PBM Legislation: Why Plan Sponsors Should be Aware

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It should come as no surprise that state laws seeking to regulate pharmacy benefit managers (PBMs) have increased exponentially over the past four years. These laws focus on a variety of areas in which PBMs operate including mail-order pharmacies, specialty and preferred networks, mandatory pharmacy reimbursement, point-of-sale rebates and copay accumulator programs. Understandably, these developments have come with significant confusion amongst plan sponsors, state regulators and PBM vendors alike. Some of these laws have been met with federal preemption challenges and are making their way through our federal court system.

## Why PCMA v. Mulready could have far-reaching consequences for self-funded ERISA plans

The most significant ongoing legal challenge is PCMA v. Mulready, a case challenging the Oklahoma Patient's Right to Pharmacy Choice Act. The law in question was passed in 2019 and prohibits the utilization of preferred pharmacy networks or any incentivizing of the use of mail order pharmacies via cost-sharing discounts or reductions in copay amounts. The Oklahoma Insurance Department sought to enforce the law against self-funded ERISA plans.

The Pharmaceutical Care Management Association (PCMA), a trade association representing PBMs, sued the state of Oklahoma Insurance Commissioner Glen Mulready arguing that the law was preempted by the Employee Retirement Income Security Act (ERISA), a federal statute that seeks to establish one uniform law for self-funded ERISA plans. The state department of insurance was prohibited from enforcing the law until April 2022 when the court ruled that the law was indeed enforceable against ERISA plans. As a result of this ruling, plans operating in Oklahoma began

receiving notice that certain plan designs were no longer viable options in Oklahoma. For example, all 90-day mail-order prescriptions were shifted to be filled as a 30-day supply at a retail pharmacy.

The PCMA has appealed this ruling to the 10th Circuit Court of Appeals. Historically, state laws seeking to regulate PBMs have only been enforceable against fully-insured plans and self-funded non-ERISA plans. This long-standing principle was weakened in 2020 after the United States Supreme Court's ruling in *Rutledge v. PCMA*. In *Rutledge*, the court upheld an Arkansas reimbursement law that said PBMs must reimburse pharmacies at a rate that is equal to or greater than a pharmacy's acquisition cost for a drug. The court said that this law was not preempted because it did not force plans to structure benefits in a particular way, it merely increased costs or altered incentives for PBMs. The Oklahoma Commissioner of Insurance contends that this ruling informs the Oklahoma case and that the 10th Circuit Court of Appeals should hold the same way.





## Distinguishing Rutledge and Mulready

The PCMA argues that the Oklahoma law at issue in Mulready is different from the Rutledge law because the Oklahoma law does force plans to structure benefits in particular ways. The Oklahoma law forecloses the options of offering a narrow pharmacy network and incentivizing participants to use mail-order pharmacies with lower cost sharing. PCMA argues that these are key plan design choices that plan sponsors may elect in order to achieve substantial savings. The forced adoption of a broad network and the inability to set cost-sharing differentials drive up the costs of plan administration. The state of Oklahoma argues that the law regulates PBM operations and not the plan itself; ERISA does not preempt state regulation of an intermediary, even where the regulation increases plan costs. However, this ignores the functional reality that PBMs step into the shoes of a plan sponsor when administering a pharmacy benefit plan, ultimately causing the law to regulate the underlying benefit plan, not just the PBM.

While these laws may be passed with the intention to lower prescription drug costs and protect consumer pharmacy choices, the danger of increased state regulatory authority is the potential erosion of employer-sponsored health plan protections. These laws often result in increased costs to plan sponsors, which may ultimately be realized by participants in the form of higher premiums.

As a result of the Oklahoma law's implementation, member-cost-share is expected to increase by 11.9%.

On January 25, the Court of Appeals for the 10th Circuit, in a somewhat rare court order, asked the Department of Labor to file a brief weighing in on the case. This is significant because this law is the first of its kind that seeks to regulate ERISA plans. Similar laws have been struck down three times in four years; courts have ruled that ERISA preempted state PBM laws in North Dakota, Iowa and the District of Columbia. The Department of Labor's input in this case has the potential to be highly influential in the case's ultimate outcome and could influence how other circuits approach this issue in the future. Oral arguments will be held May 16.

## Drug pricing reform continues to be a strong, bipartisan priority for Congress

The PBM industry continues to face additional pressure at the federal level. In the summer of 2022, the Federal Trade Commission (FTC) launched an inquiry into the PBM industry, requiring the six largest PBMs to provide information and records regarding their practices. The agency's inquiry came after months of increasing publicized pressure from Senator Chuck Grassley and other members of Congress. The inquiry will examine fees charged to unaffiliated pharmacies, the impacts that rebates and fees from drug manufacturers have on formulary design and the ultimate costs of drugs for participants.





The 118th Congress already introduced two bills in January of 2023 seeking further PBM reform: the Pharmacy Benefit Manager Transparency Act and the Prescription Pricing for the People Act. This is a strong signal that lawmakers will continue to prioritize prescription drug pricing reform, even after passage of the Inflation Reduction Act, the provisions of which are currently being implemented. The Senate held hearings in early 2023 considering a bill that would prohibit PBMs from engaging in spread pricing and require pass-through rebates.

## The importance of ERISA preemption for employer-sponsored health plans and what exactly does all this mean for self-funded plan sponsors?

Pharmacy trade associations, patients, manufacturers, PBMs and lawmakers each have their own unique perspective on issues in the drug supply chain, none of which tells the entire story. While state laws regulating PBMs aim to rein in drug spending, one of the unintended consequences is increasing plan costs. When states regulate PBM's they also directly regulate the underlying prescription drug benefit plan and any plan design choices that a plan sponsor may utilize to provide valuable benefits to participants. As PBMs become more restricted in their ability to design networks, fewer options may be available to employers ultimately resulting in increased costs.

Plan sponsors choose to self-fund their health plans for a variety of reasons, including the ability to customize a plan to meet the specific needs of their workforce, increased flexibility and control of the plan and cost savings from reduced administrative and risk fees. Another fundamental reason that employers and unions choose to self-fund is the protection from disparate and potentially conflicting state regulations provided by ERISA.

Such increased restrictions contradict Congress's manifest purpose in enacting ERISA.

## Final Thoughts

As an advocate for self-funded employers that operate businesses in many different states, Employers Health recognizes the importance in ensuring its clients are protected from burdensome and conflicting state regulations. At a minimum, it is vital that the employer's voice is brought to the table when considering these regulations and policies. Employers Health will continue to monitor developments in the Oklahoma case as well as other state legislative developments. While this year is sure to be an active one in Congress and state general assemblies, it is still unclear how much of the impact of this legislation will be shouldered by plan sponsors and participants.

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