

Commonwealth of Kentucky

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**SENATOR MAX WISE
MAJORITY FLOOR LEADER
16TH SENATE DISTRICT**

June 19, 2025

The Honorable Russell Coleman
Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601-3449

Dear Attorney General Coleman:

Pursuant to KRS 15.025, I am writing to request an advisory opinion regarding enforcement of Senate Bill 188 from the 2024 Regular Legislative Session, an act regarding pharmacy benefit managers (PBMs) and patient access to pharmacy benefits. This legislation passed by the overwhelming margins of 35-1 in the Senate, and 97-0 in the House of Representatives, and was signed into law by Governor Beshear.

Despite our best efforts to bring streamlined pharmaceutical care and experiences for Kentuckians, independent pharmacies, and health plans across the Commonwealth, the overall implementation of Senate Bill 188 (Acts Ch. 104), signed on April 5, 2024, has been disconcerting to myself and others. After multiple attempts to discuss the intent and enforcement of Senate Bill 188 with the Kentucky Department of Insurance (DOI), we seem to be at an impasse and need further guidance to proceed with full implementation of the bill.

Other states, including neighboring states, have passed legislation similar to Senate Bill 188 and are enforcing all provisions of the law. It appears Kentucky's DOI is an outlier in its interpretation of the laws. Our pharmacy community worked hard with me and the legislature to pass this law and deserves to have the protections enforced as is happening in Tennessee, West Virginia and other states. Additionally, similar enforcement questions that are outlined in this letter were raised in Texas, where the Texas Attorney General opined that the provisions in question are enforceable.

As you will see in the documents enclosed with this letter, Kentucky DOI Commissioner Sharon Clark outlines the department's interpretation of Senate Bill 188 in a February 17, 2025, letter to Dr. Benjamin P. Mudd, Executive Director of the Kentucky Pharmacists Association. In summary, the department explains it is bound by the federal Employee Retirement Income Security Act of 1974 (ERISA) and are refusing to implement the "anti-steering" provisions found in Section 4 of Senate Bill 188. They cite support of this interpretation from the Tenth Circuit U.S. Court of Appeals' *Pharmaceutical Care Management Assn. v. Mulready*, 78 F.4th 1183 (10th Cir. 2023) findings, but fail

to recognize that “anti-steering” provisions in state law were upheld in *Pharmaceutical Care Management Association v. Wehbi*, 18 F.4th 956 (8th Cir. 2021). Section 4 of Senate Bill 188 was crafted to protect Kentuckians by preserving their right to choose which pharmacy meets their needs for medical care. We need clarity on the enforceability of the “anti-steering” provisions within Senate Bill 188 so our constituents can make informed decisions about their pharmaceutical options.

Additionally, the letter reveals another unsettling interpretation by Kentucky DOI. By its assessment, any “out-of-state” PBMs that assist Kentucky businesses or constituents with the administration of their health plans may not be within the department’s jurisdiction to regulate. Therefore, DOI perceives it does not have the obligation to enforce Senate Bill 188 provisions on some of these outside entities. Sadly, this sends an inconsistent message to Kentuckians that only some individuals deserve protection of their pharmaceutical benefits while others may go unprotected. It is also unclear why the department is taking this position as a PBM must be licensed by the department to even conduct business within our state. We ask that you clarify whether Senate Bill 188 can be enforced on PBMs that may operate outside of Kentucky.

After receiving the February 17, 2025, letter, per the recommendation of Commissioner Clark, the Kentucky Pharmacists Association and the Kentucky Independent Pharmacy Alliance sought outside counsel to review these determinations. As found in Robert T. Smith’s March 12, 2025, letter to Governor Beshear, counsel refuted some of the Commissioner’s legal conclusions regarding the “anti-steering” provisions and jurisdiction over out-of-state PBMs.

At this time, we are seeking your office’s guidance. Therefore, I request that your office issue an advisory opinion regarding the following questions, which are essential to enforcement of this consensus, bipartisan legislation:

- Are the anti-steering provisions in Section 4 of Senate Bill 188 enforceable or preempted by the federal ERISA laws?
- Are PBMs that are domiciled outside of the Commonwealth, yet doing business within the state, subject to regulation under Senate Bill 188?

As a long-time advocate of PBM and health care reform, I believe we owe our constituents the best and they deserve the same protections that are being implemented in other states. I ask that you please provide clarity on the above questions so we can gain full enforcement of Senate Bill 188. Thank you for your assistance.

Sincerely,



Max Wise
State Senator

Enclosures



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February 17, 2025

Benjamin P. Mudd, PharmD
Executive Director
Kentucky Pharmacists Association
96 C. Michael Davenport Blvd.
Frankfort, KY 40601

RE: 2024 Senate Bill 188 - January 22, 2025 Letter to Commissioner Clark

Dr. Mudd,

This is in response to your January 22, 2025 letter regarding 2024 Legislative Session's Senate Bill 188's (SB 188) applicability to pharmacy benefit managers (PBMs) managing ERISA plans within Kentucky. Sections 2, 3, and 4 of SB 188 apply to "contracts issued, delivered, entered, renewed, extended, or amended on or after January 1, 2025...[t]o the extent permitted under federal law." As acknowledged by the latter provision, which appears multiple times within the bill, certain portions of SB 188 will not apply where preempted by federal law.

Specifically, you have inquired as to ERISA preemption. Generally, ERISA expressly preempts any state law that "relates to" any employee benefit plan. Two (2) recent federal court cases offer guidance on state laws aimed at regulating insurer and PBM activities in relation to pharmacy services delivered through ERISA plans. The cases are *Rutledge v. Pharmaceutical Care Management Assn.* (*Rutledge*), 592 U.S. 80 (2020), issued by the United States Supreme Court, and *Pharmaceutical Care Management Assn. v. Mulready* (*Mulready*), 78 F.4th 1183 (10th Cir. 2023), decided by the United States Court of Appeals for the 10th Circuit.¹

In *Rutledge*, the Supreme Court was asked to decide whether ERISA preempted an Arkansas statute requiring PBMs to reimburse pharmacies at a price equal to or higher than that which the pharmacy paid to buy the drug from the wholesaler. In upholding the law, the Court concluded that it amounted to "cost regulation" and held that it did not have an impermissible connection to ERISA.

¹ While Kentucky falls within the jurisdiction of the United States Court of Appeals for the 6th Circuit, the 10th Circuit provides instructive guidance in the absence of binding 6th Circuit authority.

Mulready involved an Oklahoma law that placed four (4) restrictions on PBMs: (1) PBMs were required to meet certain pharmacy network access standards; (2) PBMs and health plans could not incentivize the use of a particular pharmacy; (3) providers were allowed to participate in any pharmacy network if the provider was willing to meet the terms and conditions of participation; and (4) a PBM could not limit or deny a provider's network participation because of the employment status of a provider's employee. The *Mulready* court found that the Oklahoma law was preempted by ERISA because it governed a central matter of plan administration and interfered with nationally uniform plan administration.

Based on the above-cited federal court decisions, the Department has determined that SB 188 Section 3(2)(c) constitutes cost regulation and is therefore not preempted by ERISA. This Section of SB 188 simply requires pharmacies and pharmacists to be reimbursed at an amount of not less than the national average drug acquisition cost for a drug, plus a dispensing fee of \$10.64.

However, the provisions of SB 188 that impose restrictions similar to those in the Oklahoma law analyzed in *Mulready* are preempted by federal law. Specifically, the "anti-steering" provisions found in Section 4 of SB 188 constitute a central aspect of plan administration, rather than just cost regulation. Indeed, like the law addressed in that case, the provisions of Section 4 "home in on PBM pharmacy networks—the structures through which plan beneficiaries access their drug benefits...[and] impede PBMs from offering plans some of the most fundamental network designs, such as preferred pharmacies, mail-order pharmacies, and specialty pharmacies." *Mulready* at 1200.

In *Mulready*, the Court held that ERISA preempted a "discount prohibition" that prevented health insurers or PBMs from: (1) restricting an individual's choice between a retail pharmacy or a mail-order pharmacy; and (2) incentivizing the receipt of prescription drugs from a particular in-network pharmacy. *Id.* at 1191 and 1209. Because Section 4 of SB 188 contains analogous provisions that: (1) prohibit insurers or PBMs from incentivizing an insured's use of a mail-order pharmacy or a pharmacy affiliate;² and (2) require those entities to provide equal access and incentives to all in-network pharmacies,³ the Department has determined that those provisions are also preempted with respect to ERISA plans, under the rationale set out in *Mulready*.⁴

As to SB 188's reach over out-of-state plans engaging Kentucky providers, the Kentucky Department of Insurance will generally not exercise control over health care benefit providers who can show that they are subject to another jurisdiction, pursuant to KRS 304.11-045. However, each individual case will involve fact-specific considerations regarding the contract(s) involved and the provider(s) in question.

As for your next question, a substantive update to a PBM's provider manual *may* constitute an "amendment" to a contract, thus triggering SB 188's provisions. This will again, however, depend

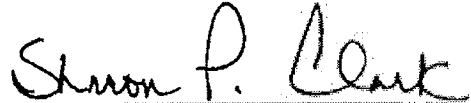
² See SB 188, Section 4(1)(a).

³ See SB 188, Section 4(1)(b).

⁴ The Department acknowledges that this conclusion may be subject to further analysis in the future, as the *Mulready* case currently has a Petition for Certiorari pending before the United States Supreme Court.

on the language of the contract, and will therefore necessarily have to be assessed on a case-by-case basis.

Finally, the Department of Insurance will serve as the agency which enforces SB 188. The Department's Consumer Protection Division, with the assistance of its Legal Division, will carefully monitor each complaint received to ensure compliance with all applicable state law, including the applicable provisions of SB 188.



Sharon P. Clark
Commissioner
Kentucky Department of Insurance

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VIA ELECTRONIC MAIL

March 12, 2025

The Honorable Andy Beshear
Governor of the Commonwealth of Kentucky
700 Capitol Avenue, Suite 100
Frankfort, Kentucky 40601

Re: Senate Bill 188 (Acts Ch. 104)

Dear Governor Beshear:

On behalf of the Kentucky Pharmacists Association and the Kentucky Independent Pharmacy Alliance, I want to express our appreciation for your leadership in signing Senate Bill 188 (Acts Ch. 104) into law on April 5, 2024. This critical legislation, which garnered strong bipartisan support, establishes much-needed oversight of pharmacy benefit managers (PBMs) to protect Kentucky's health plans, patients, and pharmacies.

Given the broad consensus that led to the passage of this law, we were surprised and concerned to learn that the Department of Insurance does not feel empowered to fully enforce its provisions. In a letter dated February 17, 2025 (enclosed), Commissioner Sharon Clark stated that certain aspects of the legislation were preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA) and, as a result, the Department would not be able to enforce the law against some PBMs—even when they serve Kentuckians or contract with Kentucky pharmacies. We respectfully believe this interpretation is incorrect and urge your Administration to reconsider.

I'll start with positive news from Commissioner Clark's letter. She recognized that the Commonwealth may regulate PBM-pharmacy reimbursements under *Rutledge v. Pharmaceutical Care Management Association*, 592 U.S. 80 (2020). There, the Supreme Court held in unanimous fashion that States may regulate PBM-pharmacy reimbursements—even when a PBM is serving an ERISA plan—without triggering preemption. Commissioner Clark should be commended for giving effect to this aspect of the Supreme Court's decision—especially in the face of shameful resistance by the PBM industry.

That said, Commissioner Clark's letter takes a concerning turn when she writes that "the 'anti-steering provisions found in Section 4 of [Senate Bill] 188"

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interfere with “a central aspect of plan administration” and are therefore preempted under the logic of *Pharmaceutical Care Management Association v. Mulready*, 78 F.4d 1183 (10th Cir. 2023), *pet. for cert. pending*, No. 23-1213 (U.S.) (filed May 10, 2024). This aspect of the letter is flawed for at least four reasons:

First, as Commissioner Clark acknowledges, the U.S. Court of Appeals for the Tenth Circuit’s decision in *Mulready* is not binding on the Commonwealth of Kentucky. Rather, as you know, Kentucky sits within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit, which has not spoken on these issues.

Second, the Commonwealth of Kentucky signed onto an *amici curiae* brief that argued that ERISA does not preempt any aspect of the Oklahoma PBM law that was at issue in *Mulready*. See Brief of Amici Curiae States and the District of Columbia, *Pharm. Care Mgmt. Ass’n v. Mulready*, No. 22-6074 (10th Cir.) (filed Oct. 18, 2022). Kentucky was no outlier in this regard. It joined a coalition of 33 other States and the District of Columbia with an array of political leanings—from California to Texas—defending the legality of Oklahoma’s anti-steering provisions. Thus, Commissioner Clark appears to have deviated from the prior viewpoint of the Commonwealth—a viewpoint that enjoyed bipartisan company.

Third, Commissioner Clark’s letter did not consider *Pharmaceutical Care Management Association v. Wehbi*, 18 F.4th 956 (8th Cir. 2021). There, the U.S. Court of Appeals for the Eighth Circuit held that the anti-steering provisions of a North Dakota PBM law do not trigger concerns under ERISA.

Finally, Commissioner Clark’s letter did not consider *amicus curiae* briefs that the United States filed in the Trump and Biden Administrations that defended the authority of States to regulate PBMs without triggering concerns under ERISA. In *Rutledge*, the first Trump Administration explained that States are free to regulate PBMs without implicating ERISA because those laws regulate “PBM administration, not ERISA plan administration.” Br. of United States as *Amicus Curiae* 15, *Rutledge v. PCMA*, No. 18-540 (U.S.) (filed Dec. 4, 2019), *available at* 2019 WL 6609430. And in *Mulready*, the Biden Administration filed an *amicus curiae* brief arguing that Oklahoma’s anti-steering provisions are not preempted by ERISA as applied directly to third-party PBMs; see Br. of United States as *Amicus Curiae*, *PCMA v. Mulready*, No. 22-6074 (10th Cir.) (filed Apr. 10, 2023). Commissioner Clark’s letter never addresses the positions of the United States taken in these cases.

Together, this chorus of support for State-PBM regulation shows the flaws in the approach encapsulated in the Kentucky Department of Insurance’s letter. As you know, a PBM is *not* an ERISA plan. Rather, a PBM *sells services* to ERISA plans (and

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non-ERISA plans). As a result, a State law that regulates the services that PBMs offer—including the conflicts of interest embedded within a PBM's business model—has no direct bearing on ERISA plans. True, such a law might limit the services “a plan might prefer that PBMs” are permitted to offer. *Rutledge*, 592 U.S. at 90. But the Supreme Court held that such a law does “not require *plans* to provide any particular benefit to any particular beneficiary in any particular way,” and it is therefore not preempted by ERISA. *Id.* Kentucky's anti-steering provisions fall comfortably within this logic.

There is a final aspect of Commissioner Clark's letter that we find disappointing; it suggests that the Department might not subject “out-of-state” PBMs to regulation under Senate Bill 188 if they can show under Kentucky Revised Statute § 304.11-045 that they are “subject to another jurisdiction.” The citation to this provision of the Kentucky Revised Statutes raises two concerns. First, on its face, the statute applies only to “providers of health care benefits.” Kentucky Rev. S. § 304.11-045. But PBMs are not providers of benefits; rather, they contract with health benefit plans to facilitate the payment of benefits. Second, the statute permits a provider of benefits to show that “while providing [medical] services it is subject to the jurisdiction of another agency of *this state*, any subdivision thereof, or the federal government.” *Id.* (emphasis added). Thus, Section 304.11-045 merely relieves the Department of Insurance of jurisdiction when another agency of the Commonwealth of Kentucky—or the federal government—is regulating a particular provider of health care benefits. It has no application to an out-of-state PBM that is facilitating benefits to Kentuckians and contracting directly with Kentucky-based pharmacies.

We urge you to consider the arguments we make in this letter and work with the Kentucky Department of Insurance to fully implement Senate Bill 188. PBMs are raising the costs of Kentuckians' medications and inhibiting their access to life-saving medications at their corner drugstores. Time is of the essence.

Very truly yours,



Robert T. Smith

Enclosure: Ltr. from S. Clark, Commissioner, Kentucky Dep't of Insur., to B. Mudd, Exec. Dir., Kentucky Pharmacists Association, Feb. 17, 2025.