



## PUBLIC PROTECTION CABINET

**Andy Beshear**  
GOVERNOR

**Jacqueline Coleman**  
LIEUTENANT GOVERNOR

**Kentucky Department of  
Insurance**

500 Mero Street, 2SE11  
Frankfort, KY 40601  
Phone: (502) 564-3630  
Toll Free: (800) 595-6053

**Ray A. Perry**  
SECRETARY

**DJ Wasson**  
DEPUTY SECRETARY

**Sharon P. Clark**  
COMMISSIONER

### **BULLETIN 2025-03**

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TO: ALL ENTITIES OFFERING PHARMACY BENEFITS IN KENTUCKY

FROM: SHARON P. CLARK, COMMISSIONER

RE: REGULATION AND ENFORCEMENT OF SENATE BILL 188 (2024 R.S.)

DATE: June 30, 2025

#### **Purpose**

This bulletin is published by the Kentucky Department of Insurance (DOI) to provide information regarding the regulation and enforcement of Senate Bill 188 (SB 188), passed during the 2024 Regular Session.

#### **Background**

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 throughout the bill—certain portions of SB 188 will not apply where preempted by federal law.

This bulletin is therefore published to provide information regarding DOI’s approach on federal preemption as it relates to SB 188 and the Employee Retirement Income Security Act of 1974 (ERISA). It is further intended to provide information regarding DOI’s approach on extraterritorial enforcement against insurance plans issued in a state other than Kentucky, particularly within the context of SB 188. Finally, it is issued to provide information regarding DOI’s approach on ordered reimbursement for certain violations of SB 188, as is permitted by Section 6 of the bill.

#### **Regulation and Enforcement Information**

##### *a. ERISA Preemption*

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 Pharmacy Benefit Manager (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 Tenth Circuit.<sup>1</sup>

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.

*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, DOI 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 Oklahoma law addressed in *Mulready*, 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;<sup>2</sup> and (2) require those entities to provide equal access and incentives to all in-network pharmacies,<sup>3</sup> DOI has determined that those provisions are also preempted with respect to ERISA plans, under the rationale set out in *Mulready*.<sup>4</sup>

A recent federal court decision from Tennessee provides further guidance as to how district court judges within the Sixth Circuit view anti-steering provisions within sister states’ laws in light of *Rutledge* and *Mulready*. In *McKee Foods Corp. v. BFP Inc.*, the United States District Court for the Eastern District of

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<sup>1</sup> While Kentucky falls within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the Tenth Circuit provides instructive guidance in the absence of binding Sixth Circuit authority.

<sup>2</sup> See SB 188, Section 4(1)(a).

<sup>3</sup> See SB 188, Section 4(1)(b).

<sup>4</sup> DOI 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.

Tennessee prohibited Tennessee’s Insurance Commissioner from applying the anti-steering provisions of the relevant law to ERISA plans. *McKee Foods Corp. v. BFP Inc.*, 2025 WL 968404, at (E.D. Tenn. 2025).<sup>5</sup>

*b. Extraterritorial Enforcement*

Subject to the limitations set out above, DOI will assert its jurisdiction to assist with resolving PBM-related complaints involving plans (both self-funded and fully funded) that were issued out-of-state, which relate to prescriptions filled by Kentucky pharmacies to Kentucky residents. Because this extension of extraterritorial jurisdiction rests solely on the inclusion of specific language within SB 188—now codified in KRS 304.17A-591 and KRS 304.17A-595—it will generally be limited to complaints arising under the provisions of that particular bill.

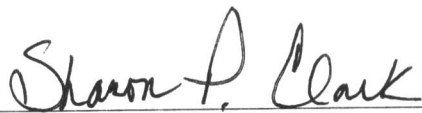
*c. Ordered Reimbursement*

Section 6 of SB 188 provides that DOI “may order reimbursement to any person who has incurred a monetary loss as a result of a violation of [the requirement for a contractually set minimum pharmacy dispensing fee, among others].”

Entities utilizing uniform pharmacy benefit agreements nationwide are hereby placed on formal notice that those agreements must conform to the requirements of Kentucky law—including SB 188—when entered with Kentucky pharmacies. In the event DOI receives complaints that entities have failed to alter their contracts accordingly, it will enforce compliance on a moving-forward basis and may also order the payment of civil penalties as it deems appropriate.

However, because *both* parties to the agreement are expected to know the minimum contractual requirements mandated by Kentucky law—and more specifically, SB 188—DOI will generally only order reimbursement in instances where the minimum dispensing fee is not paid, despite being properly set out in the contract. Conversely, in cases where the parties appear to have knowingly entered an agreement that fails to satisfy the contractual baseline established by SB 188, reimbursement will typically not be ordered. Instead, in most instances, the complaining party will be referred to the court system for the resolution of any pending dispensing fee disputes, in an effort to deter parties from deliberately entering violative agreements with an expectation that DOI will order reimbursement in the future.

For any questions regarding the content of this bulletin, please contact DOI.ConsumerComplaints@ky.gov.



Sharon P. Clark, Commissioner  
Kentucky Department of Insurance

6/30/2025  
Date

<sup>5</sup> Tennessee has appealed this decision, but during the pendency of that appeal, it remains enjoined from enforcing the anti-steering provisions.