

May 28, 2024

Superintendent Adrienne E. Harris
New York Department of Financial Services
1 Commerce Plaza
Albany, NY 12257
PBMRegs@dfs.ny.gov
Kristina.Magne@dfs.ny.gov
Submitted Electronically

Re: Proposed Consolidated Rulemaking to Amend Insurance Regulations 219, 222, 224, and 226-229 – Public Comments from The ERISA Industry Committee

Dear Superintendent Harris:

The ERISA Industry Committee (“ERIC”) appreciates the opportunity to comment on the regulations contained in “Proposed Consolidated Rulemaking to Amend Insurance Regulations 219, 222, 224, and 226-229” (“Proposed Rules”) issued by the New York Department of Financial Services (“Department”) covering pharmacy benefit managers (“PBMs”) and their network practices. While we appreciate improvements the Department has made to the Proposed Rules, we remain concerned that the underlying law represents an overreach by state authority when applied to self-insured health benefit plans governed by the federal Employee Retirement Income Security Act of 1974 (“ERISA”).

ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state and city.

Large employers have long been at the forefront of innovating health care benefit design and administration. Their ability to do so depends in large part on ERISA preemption. ERISA allows for a single set of standards for multistate employers to design and administer uniform health care and retirement benefits to their nationwide employees, regardless of where they live or work. Since ERISA’s enactment, multistate employers have done just that, securing truly effective and efficient health care coverage enjoyed today by millions of Americans.

Unfortunately, a series of state laws and regulations proposed in recent years threaten to erode ERISA preemption, endangering valuable benefits that self-insured, large-employer plans have long provided. Understandably, there is growing frustration among stakeholders about PBM practices and their role in the ever-rising costs of health care, such as how PBMs impact

patient access to pharmacists or affordable drugs (such as generics and biosimilars). Yet, many emerging state proposals are preempted by ERISA because they overstep the limited authority that court interpretations have granted to states in this space. Furthermore, many of these well-intentioned state laws have the ultimate effect of increasing health care costs across the state instead of reducing them for patients.

ERIC commends the Department for making several substantial improvements to the latest Proposed Rules. These include: 1) removing problematic provisions that would have restricted employer plan design and administration; and 2) establishing requirements for PBMs to track and report increased service costs stemming from state laws and regulations. However, the Proposed Rules continue to leave the door open for conflict with federal law, which could result in potential litigation.

ERISA self-insured health benefit plans should be exempt from the Proposed Rules.

Section 450.7(a) of the Proposed Rules explicitly prevents application of the regulations and underlying law to PBMs administering Medicare prescription drug plans. Section 450.7(b) similarly prevents application to PBMs administering health plans governed by the state's Workers Compensation Law. However, there is no such explicit exemption for PBMs administering ERISA self-insured health benefit plans.

Any application or enforcement of the Proposed Rules or underlying state law to such plans would likely be legally challenged based on ERISA preemption. Section 450.7(c) lays out severability provisions meant to protect and uphold the Proposed Rules should some portion be held as invalid or preempted by a future court ruling. Therefore, applying the Proposed Rules to ERISA self-insured health benefit plans would not only invite potential litigation on the grounds of ERISA preemption, but also jeopardize other aspects of the Proposed Rules, undermining the spirit in which the state law was passed.

To prevent future conflict with federal ERISA law, section 450.7 of the Proposed Rules should be amended to include a clause that explicitly exempts ERISA self-insured health benefit plans from regulatory requirements. As an example, this explicit exemption could read:

The following provisions of this Chapter shall not apply to a pharmacy benefit manager's provision of pharmacy benefit management services to a self-insured employer prescription drug plan offered pursuant to the federal "Employee Retirement Income Security Act of 1974," codified at 29 U.S.C. §1001 et. seq. To the extent a pharmacy benefit manager is providing services for other health plans in addition to self-insured employer prescription drug plans governed by federal law, the provisions of this Chapter shall continue to apply to the pharmacy benefit manager in its performance of pharmacy benefit management services to those other health plans.

ERIC appreciates the opportunity to provide regulatory comments on the Proposed Rules, and applauds changes made by the Department to the Proposed Rules that are designed to reduce their impact on plan design and administration. Despite this, the lack of an explicit exemption for ERISA self-insured health benefit plans creates a conflict between state and federal law that will likely lead to litigation if not addressed. To protect the ability of large-employer plan sponsors to effectively offer health benefits plans for millions of Americans, **ERIC strongly encourages the Department to include an explicit exemption for ERISA self-insured health benefit plans and the PBMs that administer them when doing so on their behalf.**

If you have any questions concerning our regulatory comments, the impact the Proposed Rules would have on ERISA self-insured health benefit plans, or changes that could be made to avoid ERISA preemption conflicts, please contact us at (202) 789-1400 or dclair@eric.org.

Sincerely,



Dillon Clair
Director, State Advocacy