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March 28, 2023

The Honorable Melony Griffith
Chair, Senate Finance Committee
Maryland General Assembly
Miller Senate Office Building
Annapolis, MD 21401

RE: AHIP Opposition – HB 357 / SB 898 in relation to ERISA

Dear Senator Griffith;

I write today on behalf of AHIP to respectfully oppose HB 357, legislation regulating pharmacy benefits managers (PBM). Our concern focuses on the bill's extension to ERISA policies. This legislation will jeopardize the single, cost-saving standard your state's self-insured employers rely upon to provide uniform and affordable health insurance coverage to Marylanders.

Health insurance should be simple, effective, and affordable. Patients and employers should not have to navigate complex regulations to get the care they need at a cost they can afford. AHIP supports a single, cost-saving national standard of regulation for self-funded employer-provided coverage, ensuring more affordable coverage for all, that is easier to understand. A 50-state patchwork of complicated and inconsistent mandates for employer-provided coverage will cause more confusion and make coverage more expensive for Maryland's employers and employees.

HB 357 will increase health care costs by subjecting Maryland's self-insured employers to new state requirements. Self-funded employer-provided health plans are currently regulated by the Employee Retirement Income Security Act (ERISA), which sets standards and creates uniformity for employers managing benefits across multiple state lines under its preemption provision. HB 357 changes the term "purchaser", which under current law acts to exclude self-funded ERISA plans from being subjected to state laws. This definitional change will subject Maryland self-insured employers to new state pharmacy coverage requirements.

ERISA's preemption provision was recently upheld in the Supreme Court case *Rutledge v. PCMA*. This case affirmed the long-standing precedent that state laws are preempted by ERISA when they impact a core function of health plan administration or directly relate to the health plan. The *Rutledge* Court clarified a very narrow set of activities that states could regulate; it did not create a new category of permissive state regulation, which HB 357 attempts to accomplish.

- We have attached **an analysis from ERISA experts at The Groom Law Group that outlines which HB 357 (as introduced) provisions exceed the scope of the *Rutledge v. PCMA* decision** and thus should be preempted.

March 28, 2023

Thank you for your consideration of AHIP's concern and opposition to HB 137. We stand ready to partner together in making health care more affordable and accessible for the citizens of Maryland.

Sincerely,

Kris Hathaway
Vice President, State Affairs
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AHIP

AHIP is the national association whose members provide health care coverage, services, and solutions to hundreds of millions of Americans every day. We are committed to market-based solutions and public-private partnerships that make health care better and coverage more affordable and accessible for everyone. Visit www.ahip.org to learn how working together, we are Guiding Greater Health.

ERISA Preemption of MD HB 357

ERISA preempts any state law that "relates to" an ERISA-covered employee benefit plan. ERISA § 514(a). As recognized by the Supreme Court of the United States, a central purpose of ERISA's broad preemption provision is to allow for the uniform administration of ERISA plans. *See, e.g., Egelhoff v. Egelhoff*, 432 U.S. 141, 148 (2001) (holding that ERISA preempted a state statute governing beneficiaries under an ERISA plan). A state law "relates to" a plan, and implicates preemption, when it has a "connection with or reference to" an ERISA plan. *Id*. at 147.

The Supreme Court in *Gobeille v. Liberty Mut. Ins. Co*. determined that a state law has an impermissible reference to an ERISA plan and is preempted "[w]here a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation." 577 U.S. 312, 319–20 (2016) (internal quotations omitted). Additionally, "ERISA pre-empts a state law that has an impermissible connection with ERISA plans, meaning a state law that governs . . . a central matter of plan administration or interferes with nationally uniform plan administration." *Id.* (internal quotations and citations omitted). The *Gobeille* decision was cited approvingly by the most-recent Supreme Court decision on ERISA preemption, *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474 (2020). That said, *Rutledge* did expand the scope of permissible state regulation over pharmacy benefit managers in their contractual relationships with pharmacies, which has an indirect financial impact on ERISA-covered plans.

In *Rutledge v. PCMA*, the Supreme Court held that an Arkansas rate-setting statute that set rates with respect to PBMs did not have an impermissible reference to or connection with ERISA-covered plans. It found that any economic impact of the state's rate setting on plans was indirect and did not bind plans' benefit design choices. The Court, in *Rutledge*, did however affirm that preemption should apply where acute, (even if indirect) economic effects effectively bind the benefit choices of plan sponsors under ERISA. The Court's decision also affirmed long-standing precedent that state laws are preempted by ERISA when they impact a core function of plan administration, mandate a certain scheme of benefits coverage, or directly refer to the plan.

Since *Rutledge*, one district court has held that Oklahoma's PBM regulation that directly impacts ERISA-covered plans benefit designs was not preempted by ERISA relying on *Rutledge*. *PMCA v. Mulready*, 598 F. Supp. 3d 1200, 1208 (W.D. Okla. 2022). The court, however, did not provide a thorough analysis of the impact of the state statute on ERISA-covered plans. Rather, the court's conclusory decision relies entirely on the fact that the statute regulates contracts between the PBM and the pharmacy (notwithstanding the direct economic and benefit design impacts of those contractual regulations on ERISA-covered plans). That case is currently on appeal to the Tenth Circuit Court of Appeals which has requested the Department of Labor's views on ERISA's preemptive effect on the Oklahoma law. Accordingly, this is a highly unsettled area of the law and the District Court opinion in *Mulready* does not represent the final determination of the extent to which states may regulate PBMs with respect to their ERISA-covered business.

With respect to Maryland HB 357, the legislation seeks to impose the state's insurance laws governing PBMs directly to ERISA-covered health plans. HB 357 accomplishes this by eliminating the specific exclusion of ERISA plans from the statute and including a much broader concept of "purchasers" of PBM services. Despite the contentions of the legislators, if this statutory change is adopted a number of these provisions should be preempted by ERISA based on existing Supreme Court jurisprudence, including *Rutledge*. In the following chart, we identify the specific bill provision, provide a description of the provision, and include the basis for federal law preemption.

Provision	***Description***	***Reason for Federal Law Preemption***
Md. Code Ann., Ins. § 15-1611.1(a)	Prohibits PBMs from requiring the use of pharmacies affiliated with the PBM.	This provision limits the ability of ERISA-covered plans to determine the scope of their pharmacy networks, which is inherent in the plan's benefit design. Thus, the provision should be preempted because it requires a specific benefit design choice by the plan sponsor.
Md. Code Ann., Ins. § 15-1612(b)	Prohibits a PBM from reimbursing a non-affiliated pharmacy less than the PBM reimburses affiliated pharmacies.	This provision limits the ability of ERISA-covered plans to contract for high-value pharmacy networks, which is inherent in the plan's benefit design. Thus, the provision should be preempted because it requires a specific benefit design choice by the plan sponsor.
Md. Code Ann., Ins. § 15-1629	Proscribes the manner in which PBMs may audit pharmacies and recover overpayments.	This provision could impose acute *and* direct economic burden on plans because it limits recovery of plan assets. Moreover, it could directly conflict with ERISA's fiduciary duty to act solely in the interest of the plan. As a result, the provision should be preempted.