Draft: 8/3/26

Employee Retirement Income Security Act (ERISA) and
Alternative Health Coverage (B) Working Group
Virtual Meeting
July 22, 2026

The Employee Retirement Income Security Act (ERISA) and Alternative Health Coverage (B) Working Group of the Regulatory Framework (B) Task Force met July 22, 2026. The following Working Group members participated: Andria Seip, Chair (IA); Sara Farris, Vice Chair (AR); Yada Horace (AL); Sophie Thomas (CO); Mike Milnes (FL); Weston Trexler (ID); Shaun Orme (KY); Mary Kwei (MD); Amy Hoyt and Melissa Panettiere (MO); Robert Croom (NC); Crystal Bartuska (ND); Martin Swanson (NE); Jack Childress (NV); Laura Miller (OH); Andy Schallhorn (OK); Jill Kruger (SD); Shelley Wiseman (UT); Mary Ashby Brown (VA); Delika Steele (WA); and Lauren Van Buren (WI).

1. Adopted the Revised Draft *Guidance Document – ERISA Preemption and State PBM Laws*

Seip explained that she and Farris participated in a drafting group that included state insurance regulators from Alabama, Massachusetts, Missouri, Nebraska, North Dakota, Virginia, and West Virginia. The group had been meeting biweekly to revise the May 11 draft of the *Guidance Document – ERISA Preemption and State PBM Laws* (Guidance Document) based on comments received during the comment period ending July 17. Seip walked through the revised draft Guidance Document dated July 8, 2026. Seip explained the revisions and the rationale for the changes, as well as explaining why certain suggestions were not included.

Seip reiterated that the purpose of the Guidance Document is to provide guidance to state regulators as they or their legislatures consider pharmacy benefit manager (PBM) legislation. It is helpful for regulators to understand how courts have interpreted state PBM laws and whether there is an intersection with ERISA. Seip explained the difficulty with finalizing a document while the courts are actively litigating. Since the last draft, cases still subject to judicial review have been added in an addendum.

Seip reviewed the revisions and explained that most of the changes to the document were technical, cleanup-type changes. Seip explained that some language suggestions were offered for the section "ERISA Preemption." The current language was retained because it mirrors the NAIC *Health and Welfare Plans under the Employee Retirement Income Security Act: Guidelines for State and Federal Regulation* (ERISA Handbook).

Seip said there were some additional language suggestions offered in the "Lessons for States" section that were not incorporated into the draft. One comment suggested that laws with an option for self-funded plans to voluntarily participate in a state's regulatory structure would likely be unenforceable. The drafting group disagreed and did not add such language. Another suggestion was to add language from a 1997 Supreme Court case describing when a state law has an impermissible "connection with" an ERISA plan. The reference was not added because the current language quotes the Supreme Court in Rutledge v. Pharmaceutical Care Management Association (PCMA), and a detailed analysis of the "connection with" phrase can be found in the ERISA Handbook, which is repeatedly referenced in the Guidance Document. Seip said a comment suggested that this section could benefit from additional emphasis on the fact that this area of law is evolving as new cases are decided. This point is made throughout the paper, and additional language in this section was considered unnecessary.

Seip explained that the chart of categories of state laws at issue in Rutledge v. PCMA, PCMA v. Wehbi, and PCMA v. Mulready was updated to clarify that the citations in the chart are to the state laws that were at issue at the time the case was litigated and may have been amended since the cases were decided.

 

Seip summarized the revisions that were made to the addendum. The addendum is intended to assist states in this rapidly evolving environment where cases are rapidly progressing through the legal process, and new cases are being filed. The addendum lists ongoing cases in alphabetical order and provides a brief summary. Seip said a comment was received suggesting that the summary of the Iowa Association of Business and Industry v. Ommen should list not only the provisions that were enjoined but also those that were not. The drafting group decided not to include this level of detail in the addendum summaries, as it is readily available in the decision. PCMA v. Bonta was removed from the addendum because the court had not yet taken any action in the case. The case of Flowers v. Caremark PCS Health was added to the addendum.

Carl Schmid (HIV+Hepatitis Policy Institute) asked whether there were plans to keep this document updated on a consistent basis. He also reiterated his opinion that state laws that were not preempted in court cases should be listed, as this information is important for state insurance regulators and legislators to review as they consider new laws. Seip said that her priority is to finish this version of the Guidance Document and that the issue of potential updates is best left for a later time once pending cases are finalized. She said the Working Group will consider how best to address this issue, whether through updates to this document or something else. She said the Working Group will consider this issue in the context of the Working Group's charges going forward.

Swanson made a motion, seconded by Farris, to adopt the revised Draft *Guidance Document—ERISA Preemption and State PBM Laws (see NAIC Proceedings, Summer 2026, Health Insurance and Managed Care (B) Committee, Attachment ?).* The motion passed unanimously.

2. Discussed its Next Steps

Seip said that this draft will be considered for adoption by the Regulatory Framework (B) Task Force and the Health Insurance and Managed Care (B) Committee at their respective meetings at the upcoming Summer National Meeting.

Following the Summer National Meeting, a regulator-only drafting group plans to begin drafting a guidance document on level-funded plans. Level-funded plans are an increasingly popular arrangement typically sold to small employers that involves self-funding with a fixed amount (level-funded) stop loss policy. State insurance regulators who are interested in participating in the drafting group should contact Jennifer Cook (NAIC).

Having no further business, the ERISA and Alternative Health Coverage (B) Working Group adjourned.

 

Draft: 6/18/26

Employee Retirement Income Security Act (ERISA) and
Alternative Health Coverage (B) Working Group
Virtual Meeting
May 18, 2026

The Employee Retirement Income Security Act (ERISA) and the Alternative Health Coverage (B) Working Group of the Regulatory Framework (B) Task Force met May 18, 2026. The following Working Group members participated: Andria Seip, Chair (IA); Sara Farris, Vice Chair (AR); Yada Horace (AL); Kim Williams (CO); Howard Liebers (DC); Alexis Bakofsky (FL); Shannon Hohl and Weston Trexler (ID); Craig Van Aalst and Julie Holmes (KS); Shaun Orme (KY); Mary Kwei (MD); Melissa Panettiere (MO); Robert Croom (NC); Ross Hartley (ND); Maggie Reinert (NE); Alexia Emmermann (NV); Laura Miller (OH); Andy Schallhorn (OK); Travis Jordan and Frank Marnell (SD); Shelley Wiseman (UT); Mary Ashby Brown and Stephen Hogge (VA); Sarah Smith (WI); and Michael Malone (WV).

1. Reviewed the Revised Draft *Guidance Document: ERISA Preemption and State PBM Laws*

Seip explained that she and Farris participated in a drafting group that included state insurance regulators from Alabama, Massachusetts, Missouri, Nebraska, North Dakota, Virginia, and West Virginia. The group had been meeting biweekly to revise the Feb. 2 draft of the *Guidance Document: ERISA Preemption and State PBM Laws* (Guidance Document) based on comments received during the comment period ending March 3. Seip walked through the revised draft (Attachment X), explaining the revisions and the rationale for the changes the drafting group made, as well as explaining why certain suggestions were not included.

Seip reiterated that the purpose of the Guidance Document is to provide guidance to state regulators as they or their legislatures consider pharmacy benefit manager (PBM) legislation. It is helpful for regulators to understand how courts have interpreted state PBM laws and whether there is an intersection with ERISA.

A. Comments on the Scope and Introduction

Seip said that there were several comments made regarding the scope of the Guidance Document. The first addition was to include the following on the top of the first page: “Disclaimer: The information in the paper is current as of [insert publication date].” Additional explanatory language was added to the introduction to clarify that this document addresses issues only from the Supreme Court case *Rutledge v. PCMA* and procedurally final cases post-*Rutledge*. Pending cases and cases eligible for appeal are not included. For example, the Fourth Circuit reached a decision in *McKee Foods Corporation v. BFP Inc.* This case is not included in the paper because it is still subject to appeal to the Supreme Court. Commenters also suggested aligning this paper with the NAIC *Health and Welfare Plans Under the Employee Retirement Income Security Act: Guidelines for State and Federal Regulation* (ERISA Handbook). The draft was revised to reference the ERISA Handbook in the introduction and in several places throughout.

Several comments suggested adding policy pros and cons, as well as policy arguments related to PBMs and PBM oversight. The paper focuses on the court's legal analysis rather than matters that might be considered opinions, so the revised draft did not incorporate opinion-type suggestions. The revised draft does reference the PBM law in effect when *Rutledge* was decided, in recognition that the law has changed since then. There were comments made suggesting changes to the sentence in the paper that said, “Per *Rutledge,* ERISA does not preempt state regulations that 'merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage.’” This phrase is a key part of the *Rutledge* holding that is especially

 

relevant to states assessing potential or current legislation. The revised Guidance Document retained this sentence unchanged.

B. Comments on ERISA Preemption

Several comments were submitted emphasizing the importance of describing the ERISA preemption tests. In response to those comments, a reference to the ERISA Handbook was included that contains a fulsome explanation of ERISA preemption and state law, as well as clarifying that ERISA's "saving" and "deemer" clauses were not considered in the cases analyzed in this Guidance Document.

C. Comments on Cases Addressing ERISA Preemption Analysis of State PBM Laws

Comments were submitted suggesting the inclusion of the Supreme Court case *Gobeille v. Liberty Mutual*. The revised draft added a footnote explaining that *Gobeille* is not a PBM case but an ERISA preemption case that regulators may want to familiarize themselves with and included a citation to the ERISA Handbook.

The revised draft incorporated suggested comments in the analysis of *Pharmaceutical Care Management Association v. Wehbi*. The revised draft clarifies the two tests used to determine whether a law "relates to" an ERISA plan such that it is preempted: does the law make "reference to" an ERISA plan or have an impermissible "connection with" an ERISA plan.

The revised draft included suggested language in the *Pharmaceutical Care Management Association v. Mulready* analysis clarifying that the Medicare Part D preemption issue is outside the scope of this Guidance Document.

Seip explained that the revised Guidance Document includes an "Addendum" of ongoing cases. Many comments were received about pending litigation. The Working Group acknowledges that this is an ongoing issue and aims to make it as useful as possible. This issue will have to be revisited as cases conclude, and this Guidance Document will need to be revised to stay current. In recognition of the PBM litigation that is currently ongoing, brief summaries of ongoing cases have been added to the addendum.

D. Comments on Lessons for States

The revised draft incorporated comments received regarding the importance of considering the full preemption test, including the saving clause, and added a sentence in a footnote pointing out that the United States, in its amicus brief to the Tenth Circuit in the *Mulready* case, took the position that the PBM law at issue was saved from preemption as a law that regulates insurance. The Tenth Circuit did not consider the saving clause because, in its view, the state failed to preserve the argument at the district court.

In the section on "Principles to Apply," the revised Guidance Document did not incorporate the suggestion to limit the section to an analysis of fully insured plans. Many states' laws apply to all PBMs, regardless of whether they work with fully insured or self-funded plans.

E. Addendum of Pending Cases

Seip explained that this latest draft includes brief summaries of pending cases addressing ERISA preemption of state PBM laws. While the main part of the paper does not analyze pending cases, the Working Group wanted to flag cases ongoing at the time of publication for monitoring.

Carl Schmid (HIV+Hepatitis Policy Institute) said that consumer representatives will plan to review this draft and submit comments. He spoke in support of adding an addendum on pending cases but noted that the Iowa case summary listed only the provisions that were enjoined and suggested also listing those that were not. Similarly, the summary of the California PBM case highlights the Pharmaceutical Care Management Association (PCMA) arguments, but not the California Attorney General's arguments from their brief.

2. Discussed its Next Steps

Seip said that this draft is exposed for a 30-day public comment period ending June 18. Comments should be emailed to Jennifer Cook (NAIC). Commenters are encouraged to provide suggested language and to keep comments within the scope of the document.

Having no further business, the ERISA and Alternative Health Coverage (B) Working Group adjourned.

 

Draft: 4/1/26

Employee Retirement Income Security Act (ERISA) and Alternative Health Coverage (B) Working Group
San Diego, California
March 24, 2026

The ERISA and Alternative Health Coverage (B) Working Group of the Regulatory Framework (B) Task Force met in San Diego, CA, March 24, 2026. The following Working Group members participated: Andria Seip, Chair (IA); Sara Farris, Vice Chair (AR); Kelli Littlejohn Newman (AL); Debra Judy (CO); Alexis Bakofsy (FL); Weston Trexler, Shannon Hohl, and Randy Pipal (ID); Julie Holmes (KS); Shaun Orme (KY); Mary Kwei (MD); Robert Croom (NC); Chrystal Bartuska (ND); Martin Swanson (NE); Alexia Emmermann (NV); Kristin Cly (OH); Andy Schallhorn (OK); Jill Kruger (SD); Tanji J. Northrup (UT); Julie Blauvelt and Mary Ashby Brown (VA); Sofia Pasarow (WA); Sarah Smith and Lauren Van Buren (WI); and Joylynn Fix (WV). Also participating were: Michelle Heaton (NH); and Rachel Bowden (TX).

1. Adopted its Feb. 26 Minutes

Seip said the Working Group met Feb. 26. During this meeting, the Working Group took the following action: 1) discussed its name change and new charge; 2) heard preliminary feedback on the draft *Guidance Document: ERISA Preemption and State Pharmacy Benefit Manager (PBM) Laws*; and 3) discussed next steps, which would likely involve discussing comments received on the guidance document at the Spring National Meeting.

Trexler made a motion, seconded by Farris, to adopt the Working Group's Feb. 26 minutes (Attachment One-A). The motion passed unanimously.

2. Discussed Comments Received on the draft *Guidance Document: ERISA Preemption and State Pharmacy Benefit Manager (PBM) Laws*

Seip said the Working Group received four comment letters on the guidance document, which were posted on the Working Group's web page. The National Community Pharmacists Association (NACP), Pharmaceutical Care Management Association (PCMA), NAIC consumer representatives, and AHIP all submitted comment letters. Seip said the comments were detailed and will take some time to review.

Seip explained that the drafting group that produced the draft guidance document has been meeting bi-weekly since 2025, most recently on March 16. At that meeting, the drafting group discussed what would be the best approach to address the comments. Given the length and complexity of the comments, the Working Group expressed its willingness to continue to meet to review the comments and prepare a second draft for further discussion. Seip said the Working Group was committed to a transparent process and to explaining revisions to the draft relative to the comments received in an open meeting, in addition to another public comment period on the revised draft. Seip asked if there were any questions or concerns about having the drafting group revise the draft guidance document.

Newman asked whether any additional regulators could participate in the drafting group. She said she is a pharmacist and the new senior director of pharmacy benefit management (PBM) compliance with the Alabama Department of Insurance (DOI) and expressed her interest in joining the drafting group. Seip said Newman was welcome to join the drafting group.

 

Chris Petersen (PCMA) said the proposed approach to revising the guidance document makes sense given that the issues in it are too complicated to discuss in a large group setting. Petersen offered to make PCMA's ERISA counsel available to the drafting group to answer any questions about the PCMA comment letter.

Seip said that during its March 16 call, the drafting group discussed some of the big-picture issues raised in the comment letter. First, several comment letters asked about the guidance document's relationship with the NAIC's *Health and Welfare Plans Under the Employee Retirement Income Security Act: Guidelines for State and Federal Regulation* (ERISA Handbook). Seip explained that the ERISA Handbook is a treatment of settled law, while the guidance document is focused on an issue that is in flux. At present, these issues are not suitable for inclusion in the ERISA Handbook; however, they may be considered for addition in the future as circumstances change. The drafting group did agree, however, that the guidance document should make reference to the ERISA Handbook for its more fulsome treatment of certain issues, like general ERISA preemption and summaries of Supreme Court of the United States (SCOTUS) cases.

Another big-picture issue raised in the comment letters was the inclusion of policy or opinion-type language regarding PBMs. The Working Group is endeavoring to develop a fact-based document and does not plan to opine in this document about whether something is good or bad from a policy perspective. As a result, the drafting group does not plan to make those kinds of changes to the draft.

Lastly, some comment letters mentioned pending litigation. Seip said that she is aware of a few states with pending PBM litigation, including Iowa. The drafting group does not plan to include live cases or controversies in the guidance document. Heaton suggested sharing a list of ongoing cases so people can track them and know which states to contact if litigation arises. Seip said the drafting group is considering how to do that.

3. Discussed its Next Steps

Seip stated that she wanted to discuss the Working Group's new charge for 2026 and some of the projects that it plans to work on next. Last year, the Regulatory Framework (B) Task Force asked the Working Group to look at level-funded plans. The Working Group heard a presentation on level-funded plans from the National Association of Benefits and Insurance Professionals (NABIP) at the 2025 Summer National Meeting and started to draft an outline. The former chair of this Working Group, Robert Wake (ME), filled in the outline and created a rough draft of a paper on level-funded plans. Seip asked for volunteers to form another drafting group to review Wake's rough draft and develop a draft paper that the Working Group can expose for public comment.

Saip said the Working Group's new charge in 2026 is to "monitor, analyze, and report, as necessary, developments related to excepted benefits coverage, short-term, limited-duration (STLD) coverage, health sharing ministry coverage, and coverage that is offered and marketed as a substitute for, or an alternative to, comprehensive major medical coverage." Seip said she would like to know what the most useful thing would be to focus on under this charge. She mentioned that one idea would be to develop a repository of state laws for some of these alternative coverages. For example, laws addressing STLD plans vary from state to state. Seip said that a common criticism of STLD plans is that they are "junk plans." However, Iowa requires that STLD plans include certain benefits, like prescription drug coverage and mental health and substance use disorder (MH/SUD) coverage, as well as limits on the maximum out-of-pocket coverage that can be charged. While they are allowed to be underwritten, STLD plans must comply with certain mandated benefits and some consumer protections. Seip stated that while they are not a substitute for major medical coverage, she does not consider STLD plans to be junk plans in Iowa.

Seip asked whether states are interested in a resource showing how states are addressing the increasing number of alternative coverages, such as hospital indemnity and accidental death benefits. Hohl said that Idaho would like to contribute to a repository of state laws and see what other states are doing in the areas outlined in the charge. Kwei asked whether the idea was to look only at state laws or also at enforcement actions regarding misleading marketing. Seip said that the Working Group is collecting ideas. No decisions have been made. Swanson said that the plans may not be junk, but the way they are marketed and sold may be inappropriate, so that they turn out to be junk for the purpose for which consumers are buying them. Swanson said he could see a benefit to collecting laws governing alternative plans as well as laws around the sale and enforcement actions.

Van Buren said Wisconsin is seeing hundreds of enforcement actions and has been pursuing actions aggressively, agent by agent and consumer by consumer. She said that Wisconsin appreciates the Working Group's efforts to address these issues and is closely monitoring any proposed solutions. Swanson said that he remembered that the NAIC, at some point in the recent past, started cataloging state laws on STLD plans, so there is already a starting point. Jennifer Cook (NAIC) confirmed that that is true. Swanson also mentioned a list of health care sharing ministries (HCSMs) and suggested including farm bureaus in any efforts. Swanson said he is very interested in what other states are doing relative to HCSMs. He said the Nebraska DOI does not have jurisdiction and sends complaints to the attorney general's (AG's) office. The AG then has to inform them that they are out of luck because there is no contractual obligation to pay. Swanson said he would like to see what other states are doing in the area and whether they know of any ministries acting outside the scope of the Affordable Care Act (ACA). He also said he is seeing more sharing plans that are not religious in nature.

Bartuska said she is interested in a repository of information on STLD plans and accident and sickness plans, as well as excepted benefits. She said North Dakota recently denied quite a few carve-out type plans that it does not feel fall under excepted benefits; however, other states have approved them. Heaton supported what Bartuska was saying and said she would support guidance around excepted benefits and STLD plans. She said that as changes at the federal level increase the pressure for alternative plans, it becomes increasingly important for states to confirm they are making the correct analysis of the filings and are consistent with other states. Bowden said it would be helpful for the repository of state laws and rules on alternative plans to identify differences in interpretations along the lines that Bartuska mentioned. One example might be which states allow reference-based pricing style plans to qualify as fixed-indemnity plans.

Hohl suggested starting with a chart of state laws on the coverages included in the Working Group's charge, building on the information the NAIC has collected already. Once it has enough information, it can identify states that may be doing things differently or better and could have a series of short presentations from a few states. She said she knows Idaho is doing a few things differently, and it might be beneficial to hear from a few states regarding what is working well in their markets.

Swanson mentioned that the Working Group will likely want to get the U.S. Department of Labor (DOL) involved in some of these conversations about alternative arrangements, especially level-funded plans, to better understand the insurance regulator's role and what the DOL might be doing.

Lucy Culp (Blood Cancer United) suggested that the Working Group look at the *Supplementary and Short-Term Health Insurance Minimum Standards Model Act* (#170) and the *Model Regulation to Implement the Supplementary and Short-Term Health Insurance Minimum Standards Model Act* (#171). While the models are not perfect, they represent the collaboration, negotiation, and hard work that went into thinking about how to best balance the needs of different types of consumers with the needs of industry and seem to address the plans listed

in the charge. Culp suggested that the repository of laws could reflect the states that have adopted Models #170 and #171.

Culp encouraged regulators to keep preexisting conditions in mind and consider options for people who cannot pass medical underwriting. Culp also encouraged regulators to think about how to understand where consumers are turning for health care coverage since the expiration of the federal tax credits, whether through a data call or other method. She stated that the NAIC consumer representatives are interested in partnering to obtain more information.

Petersen agreed with Culp that Model #170 and Model #171 are good places to start to assemble a repository of state laws. He stated that Model #170, Model #171, and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) provide a definition of what a fixed indemnity plan is and what a hospital indemnity plan looks like. He also agreed with Swanson that one of the problems with alternative coverages is not how the products are designed, but how they are marketed and what they are called once a product has been approved. He said regulators need to be mindful of not only what is in the product but also of how it is being presented to the public. Van Buren said it would be helpful if companies were more aggressive in terminations for cause when agents market products improperly.

Seip asked Working Group members, interested regulators, and interested parties to email Cook by April 30 with any ideas for addressing the Working Group's new charge.

4. Discussed Other Matters

Seip said there seems to be a resurgence of "creative" activity in how plans are being designed and marketed as more people search for affordable health coverage options. The Working Group anticipates holding some regulator-to-regulator meetings this spring, looking into unauthorized activity that has come to regulators' attention and falls under paragraph 2 (pending investigations) and paragraph 3 (specific companies, entities, or individuals) of the NAIC Policy Statement on Open Meetings.

The Working Group also plans to work in collaboration with the Improper Marketing of Health Insurance (D) Working Group. The Working Groups plan to meet April 2 in joint regulator-to-regulator session, pursuant to paragraph 2 (pending investigations) and paragraph 3 (specific companies, entities, or individuals) of the NAIC Policy Statement on Open Meetings, to discuss an issue that impacts both Working Groups.

Having no further business, the ERISA and Alternative Health Coverage (B) Working Group adjourned.

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