Published on *The National Law Review* https://natlawreview.com

50 State Map of MAC Laws – Can PBMs No Longer Rely on ERISA Preemption to Avoid Certain State Laws?

Article By:

Nick J. Welle

Hannah R. Demsien

Summary: Recent court trends suggest that preemption under the Employee Retirement Income Security Act (ERISA) may not apply to certain state laws that regulate pharmacy benefit managers (PBMs), including state laws governing Maximum Allowable Cost (MAC), which is essentially the process used by a PBM to determine in-network pharmacy reimbursement rates for generic drugs and multi-source brands. If this trend continues, this may mean that ERISA plan administrators and PBMs will need to pay very close attention to state MAC laws, as well as certain other state laws regulating PBMs. See our interactive map below that summarizes which states currently have a MAC law in place. See further details in our legal analysis below.

In December 2020, the Supreme Court in *Rutledge v. Pharmaceutical Care Management Assn.* (*Rutledge*)unanimously reversed a decision by the Eighth Circuit Court of Appeals holding that the Arkansas MAC law was preempted by ERISA. More recently, the Court ordered the Eighth Circuit to reconsider its holding in *Pharmaceutical Care Management Assn. v. Tufte*, that a broad-based North Dakota PBM law that did not include a MAC provision was preempted by ERISA, based on its holding in *Rutledge*.

The Eighth Circuit's opinion in *Rutledge* and its earlier opinion in *Pharmaceutical Care Management Assn. v. Gerhart,* 852 F.3d 722 (8th Cir. 2017), regarding an Iowa MAC law had raised issues both about the viability of the more than thirty similar state MAC laws, as well as the continued viability of the more than 45 state laws that regulate other aspects of the business relationship between PBMs and the pharmacies participating in their retail pharmacy networks.

Both opinions on the surface seemed in conflict with the Court's holding in *New York State Conference of Blue Cross Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645 (1995), that state laws that merely increased the cost paid by ERISA plans for medical services without affecting plan design decisions or otherwise precluding uniform national plan administration of ERISA plans were

not preempted. However, the Eighth Circuit analysis relied on the Court's more recent decision in *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312 (2016), which many commentators suggested raised questions about the continued viability of the Court's analysis in *Travelers.*

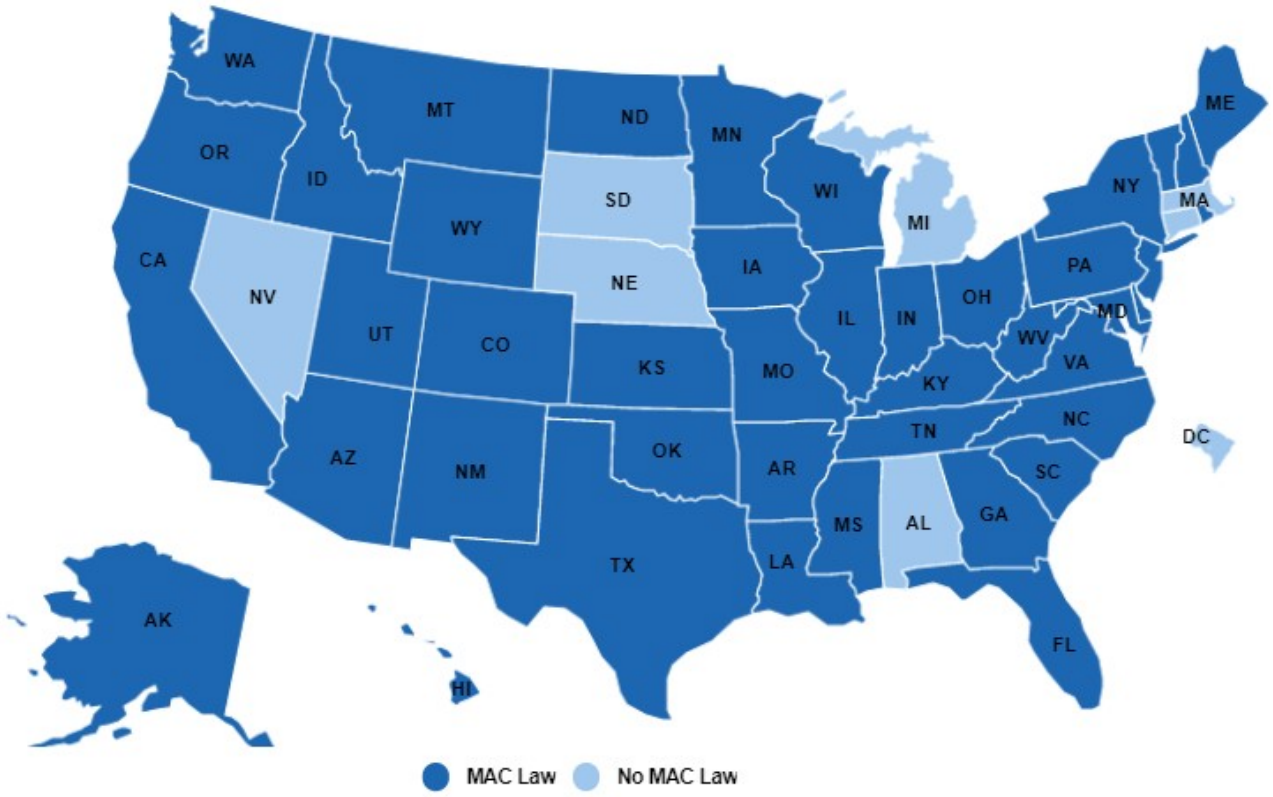
In *Gobeille,* which was decided while PCMA's challenge to the MAC law in Iowa was working its way through the courts, the Court found Vermont's all-claims database law to be preempted based on the risk that conflicting similar laws in other states would make uniform national plan administration impossible. The Eighth Circuit similarly held in both *Gerhart* and *Rutledge* that MAC laws were preempted because variations between such laws in different states similarly impermissibly interfered with uniform national plan administration.

The opinion in *Rutledge*, which relied heavily on *Travelers* and clarified the basis for the holding in *Gobeille*, has added more clarity with respect to when state laws regulating the relationship between PBMs and retail pharmacies in the PBM's networks raise ERISA preemption concerns. First, the opinion clarifies that the reason that the all-payer claims database law at issue in *Gobeille* was found to be preempted was because the law regulated an area that was a central matter of plan administration under ERISA, namely recordkeeping, disclosing, and reporting of claims data, and that a majority of the Court in *Gobeille* was concerned about the impact that differences between such laws in multiple states could have on the ability of plans to be administered on a uniform national basis.

In contrast, in *Rutledge,* both the majority opinion and Justice Thomas' concurring opinion make clear that the MAC laws do not raise similar concerns because they do not regulate the central matters governed by ERISA, namely plan design or plan administration. Rather, in the view of the Court, MAC laws merely regulate how retail pharmacies are compensated by PBMs and not central matters of plan administration. In doing so, the Court effectively acknowledged, as had a number of Courts of Appeal, that a PBM's administration of its retail pharmacy network did not involve plan administration for purposes of ERISA. As the Court clarified, a law that only increases plan costs is not preempted "even if plans decide to limit benefits or charge plan members higher rates as a result" if it does not regulate a central matter of plan administration governed by ERISA.

Key Takeaways

As a result of the emerging case law, going forward, we would expect courts to evaluate ERISA preemption claims with respect to broad-based PBM laws on a provision-by-provision basis and only invalidate those provisions that clearly and directly impact ERISA plans' plan design choices (e.g., any willing provider laws) or other areas of plan administration, such as how claims are processed (e.g., prompt pay laws). Given these developments, state MAC laws will likely become more relevant for ERISA plan administrators and PBMs. The map below indicates which states currently have some sort of MAC law in place.



National Law Review, Volume XI, Number 166