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SUMMARY

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As part of federal efforts to protect retirement income security and promote access to affordable health care for working Americans, retirees, and their families, private-sector employee benefit plans receive substantial congressional attention. The Employee Retirement Income Security Act of 1974 (ERISA, or Act) is a key federal law that regulates the retirement, health, and other benefits that private-sector employees receive, as well as the responsibilities of employers and other parties involved in providing these benefits. Recent reports estimate that there are over 4.1 million ERISA plans that cover roughly 156 million individuals and include an estimated $14 trillion in plan assets.

While Congress enacted ERISA primarily to regulate pension plans, ERISA also regulates employee welfare benefit plans offered by an employer to provide medical, surgical, and other benefits. As part of the Act, covered plans must meet certain standards set out in Title I of ERISA, which is largely administered by the Department of Labor. Under this Title, ERISA-governed plans (or, in some cases, plan sponsors or administrators) must meet various requirements relating to, among other things, reporting and disclosure, participation, benefit accrual and vesting for pension plans, plan funding requirements for applicable pension plans, and fiduciary requirements. The Act also contains an enforcement scheme that authorizes participants, beneficiaries, and other parties to bring certain civil actions to enforce provisions of the Act.

To safeguard ERISA plan participants' interests in their benefits, ERISA imposes standards of conduct for plan fiduciaries, persons who are generally responsible for the management and operation of employee benefit plans. While ERISA does not catalog every duty of a plan fiduciary, the Act establishes four basic standards of conduct: a duty of loyalty, a duty of prudence, a duty to diversify investments for applicable plans, and a duty to follow plan documents to the extent they comply with ERISA. In addition to requiring plan fiduciaries to adhere to standards of conduct, ERISA prohibits fiduciaries from causing an employee benefit plan to engage in transactions considered likely to injure an ERISA plan. The Act generally bars certain types of transactions between a plan and a "party in interest" (e.g., a plan service provider, or employees covered by the plan), unless an exemption applies. Additionally, to prevent self-dealing, ERISA prohibits specified types of transactions between a plan and a plan fiduciary. Exemptions to the prohibited transaction requirements permit, among other things, reasonable compensation arrangements with parties in interest for services needed for plan establishment or operations.

Another key feature of Title I of ERISA is its express preemption clause. As the Supreme Court has described, Congress provided for ERISA preemption in order to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." Section 514 of the Act preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." In numerous opinions, the Court has interpreted the "relate to" language as applying to any state law that "has a connection with or reference to such a plan." In conjunction with these two categories articulated by the Supreme Court, ERISA preemption analysis typically examines whether a state law interferes with ERISA's goal of uniform national standards for covered employee benefit plans.

Litigating parties frequently seek answers from the courts regarding a wide array of ERISA-related legal questions, including those related to the precise responsibilities of plan fiduciaries with respect to ERISA plans, and the degree to which ERISA supplants state law. On January 22, 2025, the Supreme Court heard oral arguments in *Cunningham v. Cornell*, a lawsuit that generally concerns the necessary elements of a claim for alleging a prohibited transaction violation against plan fiduciaries. The Court is also considering whether to grant review in *Mulready v. PCMA*, a case about federal preemption of state laws governing pharmacy benefit manager (PBM) practices.

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For decades, Members of Congress have engaged in efforts to safeguard retirement income security and ensure access to affordable health coverage for working Americans, retirees, and their families.[1] Private-sector employers play a key role in these efforts, largely through a federally regulated benefits system governed by the Employee Retirement Income Security Act of 1974 (ERISA, or Act).[2] ERISA establishes a comprehensive federal regulatory regime for private-sector employee benefit plans. While Congress enacted ERISA primarily to regulate pension plans,[3] ERISA also regulates employee welfare benefit plans offered by an employer to provide medical, surgical, and other benefits.[4] Department of Labor reports estimate that ERISA covers approximately 801,000 retirement plans, 2.6 million health plans, and 514,000 other welfare benefit plans.[5] These plans cover about 156 million workers and their beneficiaries and include an estimated $14 trillion in plan assets.[6]

Enacted in 1974, ERISA's central goal is to "protect . . . the interests of participants and . . . beneficiaries" of employee welfare and pension benefit plans and to assure that participants receive promised benefits from their employers.[7] To this end, ERISA sets "minimum standards" designed to ensure an "equitable character of [employee benefit] plans and their financial soundness."[8] ERISA does not require employers to offer employee benefits, but those that do must comply with the Act's requirements.[9] Another stated purpose of the Act is to "encourage the maintenance and growth" of employee benefit plans, as implemented through a uniform, federal regulatory regime.[10] In enacting ERISA, Congress sought to strike an appropriate balance between these objectives, as reflected in the Act's regulatory scheme, as well as in voluminous ERISA litigation.[11]

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[1] *See generally* Phyllis C. Borzi & Ali Khawar, *Introduction to the Fourth Edition: A System in Crisis? Employee Benefits in the United States: A Look Toward the Future,* of MARY ELLEN SIGNORILLE ET AL., EMPLOYEE BENEFITS LAW (4th ed. 2020).

[2] Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001–1461).

[3] This report uses the terms *pension plan* and *retirement plan* synonymously.

[4] ERISA considers a number of nonpension benefit programs offered by an employer to be "employee welfare benefit plans." For example, life insurance plans, and plans that provide dependent care assistance, educational assistance, or legal assistance, can be welfare benefit plans. *See id*. § 1002(1).

[5] DEP'T OF LABOR, PRIVATE PENSION PLAN BULLETIN, ABSTRACT OF 2022 FORM 5500 ANNUAL REPORTS 2 (2024), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2022.pdf; DEP'T OF LABOR, FACT SHEET: EBSA RESTORES OVER $1.4 BILLION TO EMPLOYEE BENEFIT PLANS, PARTICIPANTS AND BENEFICIARIES 1 (2024), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results-2024.pdf.

[6] *See* sources cited *supra* note 5.

[7] *See* 29 U.S.C. § 1001.

[8] *See id*.

[9] *See, e.g*., Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739, 743 (2004) ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan. ERISA does, however, seek to ensure that employees will not be left emptyhanded once employers have guaranteed them certain benefits." (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996)).

[10] *See, e.g.*, 29 U.S.C. § 1001b(c)(2); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995) (addressing Congress's intent to establish the regulation of employee welfare benefit plans "as exclusively a federal concern.").

[11] *See, e.g*., Conkright v. Frommert, 559 U.S. 506, 516–17 (2010) ("Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. We have therefore recognized that ERISA represents a '"careful balancing" between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.' Congress sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" (citations omitted)).

This report first provides a brief overview of ERISA's basic statutory framework and application. It then addresses two core components of the statute that affect oversight and administration of employee benefit plans and are frequently at issue in legal challenges: (1) the Act's fiduciary responsibility requirements, and (2) its express preemption clause. Finally, this report concludes with discussion of two lawsuits that involve these core components and are on the Supreme Court's docket in the October 2024 term, *Cunningham v. Cornell University* (petition for review granted) and *Mulready v. PCMA* (petition for review pending).[12]

Background on ERISA

Following some well-publicized pension defaults, Congress enacted ERISA primarily to regulate retirement benefits.[13] The Act contains four titles. Title I sets out employee benefit plan standards that are administered by the Department of Labor.[14] Title II of ERISA amends the Internal Revenue Code and is administered by the Internal Revenue Service. This title contains requirements that employer-sponsored retirement plans and other arrangements must meet to qualify for federal income tax deferrals and deductions.[15] ERISA Title III covers issues such as the coordination of jurisdictional, administrative, and enforcement matters between the Departments of Labor and the Treasury.[16] Title IV of ERISA addresses pension plan termination and establishes the Pension Benefit Guaranty Corporation (PBGC) as a government-owned corporation to insure the retirement income of participants and beneficiaries in applicable plans.[17] This report focuses on key provisions in Title I of the Act.

Although the Act governs a variety of employment-based benefit programs that provide deferred or retirement income to participants, the Act largely regulates two main types of pension plans: defined benefit plans and defined contribution plans.[18] In a defined benefit plan, an employee is promised a specified future benefit (traditionally, an annuity beginning at retirement) based on factors such as the employee's salary, age, and years of service.[19] ERISA generally requires the employer to fund a defined benefit plan adequately, invest plan assets and bear the risk for such investments, and compensate for any shortfalls.[20] Should a defined benefit plan terminate (or, in the case of a multiemployer plan, become insolvent) without sufficient funding to pay vested

[12] *See* Petition for Writ of Certiorari, Glen Mulready v. Pharm. Care Mgmt. Assoc., No 23-1213 (U.S. 2024); Petition for a Writ of Certiorari, Cunningham v. Cornell Univ., No. 23-1007 (U.S. April 12, 2024).

[13] *See, e.g.*, James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFFALO L. REV. 683 (2001) (discussing the Studebaker automobile plant shutdown as the "focusing event" for federal pension reform); Phyllis C. Borzi, *Symposium: On the Cusp: Insight and Perspectives on Health Reform: Part II: Private and Public Health Coverage: How Should They Change?: There's Private and Then There's "Private": ERISA, Its Impact, and Options for Reform*, 36 J.L. MED. & ETHICS 660 (2008) (discussion of the reasoning behind the disparity between regulation of pension and welfare benefit plans under ERISA).

[14] 29 U.S.C. §§ 1001–1193c.

[15] *See, e.g.*, 26 U.S.C. §§ 410–415.

[16] 29 U.S.C. §§ 1201–1231.

[17] *Id.* §§ 1301–1311, 1321–1323, 1341–1350, 1361–1371, 1381–1405, 1411–1415, 1426–1432, 1441, 1451–1453.

[18] *Types of Retirement Plans*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/retirement/typesofplans.

[19] *See* 29 U.S.C. § 1002(35); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999) ("A defined benefit plan, on the other hand, consists of a general pool of assets rather than individual dedicated accounts. Such a plan, as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment." (citations omitted)).

[20] *See* 29 U.S.C. §§ 1082–1085a.

pension benefits, the PBGC pays certain guaranteed benefits to plan participants, subject to statutory limits.[21]

By contrast, a defined contribution plan (e.g., a 401(k) plan) is a retirement plan that provides each participant with an individual account that accrues benefits based on employer and employee contributions, as well as any income, expenses, and investment gains or losses to the account.[22] The employee bears the investment risk, and the account value may fluctuate. Defined contribution plan benefits are not PBGC-insured.[23] Over the past few decades, there has been a steady decline in the number of defined benefit pension plans, while the number of defined contribution plans has increased.[24] According to 2022 data from the Department of Labor, there are approximately 30 million participants in defined benefit plans, and more than 121 million participants in defined contribution plans.[25]

As noted, ERISA also regulates welfare benefit plans offered by an employer, including those plans that provide health benefits.[26] ERISA applies to health coverage offered through health insurance companies or other arrangements (e.g., self-funded plans).[27] Health plans, like other welfare benefit plans governed by ERISA, must comply with various standards, including plan fiduciary standards[28] and reporting and disclosure requirements.[29] Additionally, since ERISA's enactment, Congress has taken several steps to regulate the nature and content of health plans more comprehensively. The most substantial changes were included as part of the Patient Protection and Affordable Care Act (ACA), which, among many other things, greatly expanded the scope of federal regulation over private health insurance coverage, including health benefits provided through employment-based group health plans.[30] These reforms include a required extension of dependent coverage, if such coverage is offered, to age twenty-six; a bar on lifetime and certain annual benefit limits; coverage of certain essential health benefits; a prohibition on health insurance rescissions (except under limited circumstances); and coverage of preventive health services without cost sharing.[31] Congress has passed more recent legislation regulating

[21] *See id*. §§ 1301–1461.

[22] *See id*. § 1002(34).

[23] *See, e.g., id*. § 1301(15) (defining PBGC-covered "single employer plans" as those that are defined benefit plans).

[24] DEP'T OF LABOR, PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS 1975–2022, at 5 (2024), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/pension-plan-historical-tables.pdf.

[25] *Id*.

[26] 29 U.S.C. § 1002(1).

[27] Under self-funded (or self-insured) plans, instead of using health insurance (i.e., where an employer pays a premium to an insurer to cover the claims of plan participants), an employer acts as the insurer itself and pays the health care claims of the plan participants. While self-insured plans may use an insurance company or other third party to administer the plan, the employer bears the risk associated with offering health benefits. *See Self-insured Plan*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/self-insured-plan/ (last visited March 14, 2025).

[28] 29 U.S.C. §§ 1101–1114.

[29] *Id*. §§ 1021–1032.

[30] Pub. L. No. 111-148, 124 Stat. 119 (2010). ACA was amended by the Health Care Education and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[31] These health insurance requirements were added to the Public Health Service Act and incorporated by reference into ERISA. *See* ACA, Pub. L. No. 111-148, tit. I, § 1563(e)–(f), 124 Stat. 119, (2010). For a discussion of these ACA requirements, see CRS Report R45146, *Federal Requirements on Private Health Insurance Plans,* coordinated by Ryan J. Rosso (2023).

private health insurance plans including ERISA plans. The Consolidated Appropriations Act, 2021, for instance, established new restrictions on surprise billing practices.[32]

Under Title I of the Act, ERISA-governed plans (or, in some cases, plan sponsors or administrators) must meet a variety of requirements. Among other provisions, the Act requires plans to disclose certain information to plan participants about their benefits, and plan sponsors must also report financial and other information about the plan to the Department of Labor.[33] The Act also establishes participation standards for pension plans, which include certain minimum age and service requirements on covered plans, as well as detailed vesting standards, which specify the rate at which a participant's accrued benefits in a pension plan must become nonforfeitable.[34] Additionally, applicable pension plans, particularly defined benefit plans,[35] must satisfy funding requirements to help ensure that sufficient assets are available to pay promised benefits.[36]

To safeguard ERISA plan participants' interests in their benefits, the Act also aims to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts."[37] As a central part of ERISA's enforcement scheme, the Act authorizes participants, beneficiaries, or, in some cases, a plan fiduciary or the Secretary of Labor, to bring certain civil actions to enforce provisions of the Act.[38] Among other claims, ERISA authorizes a plan participant or a beneficiary to bring an action against the plan to recover benefits, or enforce or clarify a right to future benefits under the plan.[39] ERISA also permits participants, beneficiaries, fiduciaries, and the Secretary of Labor to sue to enjoin any act or practice that violates ERISA or a plan's terms, or obtain "other appropriate equitable relief" due to an ERISA violation.[40] In addition to obtaining relief in federal court, ERISA authorizes the Secretary of Labor to assess and collect civil monetary penalties through administrative proceedings for certain violations, such as failure to provide certain required reports to the Secretary of Labor.[41]

Fiduciary Responsibility Requirements

Title I of ERISA imposes a number of obligations on plan fiduciaries.[42] A person is a plan "fiduciary" under ERISA if the person (1) exercises any discretionary authority or control with respect to the management of the plan or exercises any authority with respect to the management

[32] For background on federal surprise billing requirements, see CRS Report R46856, *Surprise Billing in Private Health Insurance: Overview of Federal Consumer Protections and Payment for Out-of-Network Services*, by Ryan J. Rosso, Noah D. Isserman, and Wen W. Shen (2021).

[33] *Id.* §§ 1021–1032.

[34] *See, e.g.*, *id*. § 1051–1061. In *DiGiacomo v. Teamsters Pension Tr. Fund*, 420 F.3d 220, 229 (3d Cir. 2005), Justice Alito, in his former position as a judge on the U.S. Court of Appeals for the Third Circuit, stated that accrued benefits, "are like chalk marks beside the employee's name. They are conditional rights that do not become 'irrevocabl[e]' until they vest."

[35] *See* discussion *infra* note 19.

[36] 29 U.S.C. §§ 1081–1085a.

[37] 29 U.S.C. § 1001(b).

[38] *See, e.g.*, *id*. § 1132.

[39] *Id.* § 1132(a)(1)(B).

[40] *Id.* § 1132(a)(3), (a)(5).

[41] *See, e.g.*, *id*. § 1132(c). *See also* FACT SHEET: ADJUSTING ERISA CIVIL MONETARY PENALTIES FOR INFLATION, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/adjusting-erisa-civil-monetary-penalties-for-inflation (last visited March 14, 2025).

[42] *See generally* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, n.8 (1985) ("The floor debate . . . [over ERISA] reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future.").

or disposition of plan assets; (2) renders investment advice for a fee or other compensation with respect to any plan asset or has any authority or responsibility to do so; or (3) has any discretionary responsibility in the administration of the plan.[43] ERISA-governed plans generally must have one or more fiduciaries named in plan documents.[44] However, other persons may also be considered ERISA fiduciaries based on their functional role with respect to a particular plan.[45]

Federal appellate courts commonly refer to ERISA's fiduciary duties as the "highest known to the law."[46] This report highlights two central parts of ERISA's fiduciary requirements in Part 4 of Title I of the Act: standards of conduct and prohibited transactions.

Standards of Conduct

While ERISA does not catalog every duty of a plan fiduciary, the Act establishes four basic standards of conduct:

1. **Duty of Loyalty.** Plan fiduciaries must discharge their duties "solely in the interest of the participants and beneficiaries" and for the "exclusive purpose" of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.[47] This duty prohibits fiduciaries from engaging in investment-related activities or other plan-related transactions for the purpose of promoting the fiduciary's own self-interest over the interests of plan participants and beneficiaries.[48]
2. **Duty of Prudence.** ERISA requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man . . . would use in the conduct of an enterprise of a like character and with like aims."[49] As the Supreme Court has noted, "[b]ecause the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific."[50] Litigation over the duty of prudence frequently arises in the context of plan investments.[51] In this context, the Supreme Court has held that duty of prudence applies not

[43] 29 U.S.C. § 1002(21).

[44] 29 U.S.C. § 1102(a)(2).

[45] *See, e.g*., Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) ("ERISA . . . defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan . . . thus expanding the universe of persons subject to fiduciary duties.").

[46] *See, e.g*., Appvion, Inc. Ret. Sav. & Emp. Stock Ownership Plan v. Buth, 99 F.4th 928 (7th Cir. 2024) (quoting Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982)).

[47] 29 U.S.C. § 1104(a)(1)(A).

[48] *See id*. Along with ERISA's duty of loyalty is an "exclusive purpose" requirement, which states that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. *Id.* § 1103(c)(1).

[49] *Id*. § 1104(a)(1)(B).

[50] Hughes v. Northwestern, 595 U.S. 170, 177 (2022). *See also, e.g.*, Stegemann v. Gannett Co., 970 F.3d 465, 474 (4th Cir. 2020) (To enforce the duty of prudence, "'the court focuses not only on the merits of a transaction, but also on the thoroughness of the investigation into the merits of that transaction.' Put another way, where a plaintiff alleges an imprudent investment decision, 'courts measure the "prudence" requirement by focusing on a fiduciary's conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment.'" (citations omitted)).

[51] Federal regulations address ERISA's duty of prudence in the context of investment duties. *See* 29 C.F.R. § 2550.404a-1 (2024).

only to the initial selection of plan investments, but includes an ongoing responsibility to monitor the investments within retirement plans.[52]

3. **Duty to Diversify Investments.** Employee benefit plan fiduciaries must diversify the investments of a plan "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so."[53] ERISA does not establish fixed criteria for investment allocations, but instead requires a determination based on the specific facts and circumstances of each plan.[54] ERISA's legislative history indicates that fiduciaries should consider factors such as the "purpose of the plan, . . . the amount of plan assets, . . . [and] financial and industrial conditions . . . .[55]
4. **Duty to Act in Accordance with Plan Documents.** ERISA requires fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]."[56] Accordingly, if a plan provision conflicts with a statutory requirement of ERISA, a fiduciary is obligated to disregard the plan provision.[57]

Prohibited Transactions

In addition to requiring plan fiduciaries to adhere to standards of conduct, ERISA prohibits fiduciaries from causing an employee benefit plan to engage in transactions considered likely to injure an ERISA plan.[58] The Act restricts two main categories of transactions.[59] First, to curb potential abuses with respect to the use of plan assets, the Act generally bars certain types of transactions between a plan and a "party in interest" (e.g., a fiduciary, service provider, or employer of employees covered by the plan), unless an exemption applies.[60] Pursuant to the Act, a fiduciary cannot cause a plan to engage in a transaction with a party in interest if the fiduciary knows or should know that the transaction is, among other things, a sale, exchange, or leasing of

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[52] *See, e.g.*, Tibble v. Edison Int'l, 575 U.S. 523, 529 (2015).

[53] 29 U.S.C. § 1104(a)(1)(C).

[54] *See, e.g.*, James Lockhart, *Fiduciary duty to diversify investments of benefit plan as required by § 404(a)(1)(C) of Employee Retirement Income Security Act (ERISA) (29 U.S.C.A. § 1104(a)(1)(c))*, 155 A.L.R. FED. 349 (2020). Additionally, under Section 404(c) of ERISA, if a defined contribution plan permits a participant or beneficiary "to exercise control over the assets in his account," a fiduciary will not be liable for any loss which may result from the participant's or beneficiary's investment choices, assuming certain requirements are met. *See* 29 U.S.C. § 1104(c).

[55] H.R. REP. NO. 93-1280, at 304 (1974).

[56] 29 U.S.C. § 1104(a)(1)(D).

[57] Courts have evaluated this requirement in the context of when compliance with a plan provision leads to a breach of other fiduciary duties. For example, in 2014, the Supreme Court unanimously concluded that in a case where plan documents compelled investment in an employer's stock and the stock was a poor investment choice, fiduciaries' decisions to retain the investments in that stock were subject to the duty of prudence. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 421 (2014) ("Consider [ERISA's] requirement that fiduciaries act "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this subchapter*." . . . This provision makes clear that the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary.").

[58] *See generally* Comm'r v. Keystone Consol. Indus., Inc., 508 U.S. 152, 160 (1993); S. REP. NO. 93-383, at 95–96 (1973).

[59] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-104632, RETIREMENT INVESTMENTS, AGENCIES CAN BETTER OVERSEE CONFLICTS OF INTEREST BETWEEN FIDUCIARIES AND INVESTORS 10 (2024).

[60] 29 U.S.C. § 1106(a). ERISA defines "party in interest" broadly to include a number of individuals who could affect a plan or its fiduciaries. *See id.* § 1002(14).

property; a furnishing of goods, services, or facilities; or a loan or other extension of credit.[61] Second, to prevent self-dealing—i.e., when a fiduciary acts in their own best interest rather than the best interest of the plan—ERISA prohibits specified types of transactions between a plan and a plan fiduciary.[62] For example, ERISA specifies that fiduciaries cannot deal with the assets of a covered plan in their own interest or for their own accounts.[63]

ERISA also contains a number of statutory exemptions to the prohibited transaction requirements. Exemptions permit, among other things, reasonable compensation arrangements with parties in interest for office space or legal, accounting, or other services needed for the establishment or operation of the plan; certain plan investments (in the form of deposits) made in banks or in similar financial institutions whose employees are covered by the plans; as well as the purchase of life insurance, health insurance, or annuities from a qualifying insurer who is the employer maintaining the plan.[64] Additionally, the Act authorizes the Department of Labor to grant exemptions to the prohibited transaction requirements for individuals or classes of fiduciaries or transactions, but only upon a determination that the exemption is administratively feasible, in the interests of the plan and its participants and beneficiaries, and protective of plan participant and beneficiary rights.[65]

Under ERISA, private parties and government entities can bring various civil actions to enforce the Act's fiduciary duty and prohibited transaction provisions.[66] Among these enforcement provisions, ERISA authorizes the Secretary of Labor, a participant, a beneficiary, or another plan fiduciary to bring a civil action to redress a breach of fiduciary duty, or for relief against a fiduciary or party in interest who causes a plan to engage in a prohibited transaction.[67] Parties that engage in a prohibited transaction may be subject to other penalties, including excise taxes pursuant to the Internal Revenue Code or monetary penalties imposed by the Department of Labor.[68]

Express Preemption of State Law

Pursuant to the Constitution's Supremacy Clause, a validly enacted federal law generally supersedes an inconsistent state law under a doctrine known as preemption.[69] In cases where federal and state laws conflict, state law may be supplanted, leaving it void and "without effect."[70] Under one type of preemption, a federal statute may displace existing state law through express

[61] *Id.* § 1106(a)(1).

[62] *Id*. § 1106.

[63] *Id*. § 1106(b)(1).

[64] *Id.* § 1108.

[65] The Department of Labor has promulgated regulations outlining the procedures for filing and processing prohibited transaction exemption applications. *See* 29 C.F.R. §§ 2570.30–2570.52.

[66] *See* 29 U.S.C. § 1132.

[67] *Id*. § 1132(a)(2), (3), (5).

[68] *See* 26 U.S.C. § 4975(a)–(b); 29 U.S.C. § 1132(i).

[69] U.S. CONST. art. VI, cl. 2. For a general discussion of the Supremacy Clause and federal preemption, *see* Cong. Rsch. Serv., *ArtVI.C2.3.4 Modern Doctrine on Supremacy Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artVI-C2-3-4/ALDE_00013402/ (last visited March 18, 2025).

[70] *See, e.g.*, Merck Sharp & Dohme Corp. v. Albrecht, 587 U.S. 299, 313 (2019) ("[I]t has long been settled that state laws that conflict with federal law are without effect." (quoting Mutual Pharm. Co. v. Bartlett, 570 U.S. 472, 480 (2013))).

language in a congressional enactment, often called an express preemption clause.[71] In those instances, determining the scope of federal preemption is generally a matter of statutory interpretation.[72]

Section 514(a) in Title I of ERISA, the Act's express preemption clause, broadly preempts "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan."[73] The Supreme Court has noted that the "basic thrust" behind Congress's inclusion of this preemption provision was "to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."[74] Pursuant to this clause, ERISA may supersede state laws that, for example, aim to regulate plan benefits, or the administration, operation, or structure of employee benefit plans.[75] The question of whether ERISA preempts state law is a frequently litigated issue that has found its way to the Supreme Court numerous times.

In several opinions, the Court has interpreted the "relate to" language as applying to any state law that "has a connection with or reference to [an employee benefit] plan."[76] The Court has observed that a state law has an impermissible "connection with" an ERISA plan if it "governs . . . a central matter of plan administration" or "interferes with nationally uniform plan administration."[77] For example, in *Shaw v. Delta Airlines*, a New York law that required plans to provide pregnancy-related benefits was held preempted because it burdened the administration of employee benefit plans.[78] Similarly, in *Egelhoff v. Egelhoff*, the Washington law at issue provided that the designation of a spouse as the beneficiary of a non-probate asset (e.g., a pension plan) would be revoked automatically upon divorce.[79] In determining that the Washington law had an impermissible connection with ERISA plans, the Court explained that one of the principal goals of ERISA is to enable employers to establish a uniform administrative scheme that provides standard procedures for the processing of claims and disbursement of benefits.[80] The Court

[71] *See generally* Lorillard Tobacco v. Reilly, 533 U.S. 525, 541 (2001). The Supreme Court has also held that preemption of state law may be implied. For a discussion of federal preemption principles, see CRS Report R45825, *Federal Preemption: A Legal Primer*, by Bryan L. Adkins, Alexander H. Pepper, and Jay B. Sykes (2023).

[72] *See, e.g.,* Puerto Rico v. Franklin Cal. Tax-Free Trust, 579 U.S. 115, 124 (2016).

[73] 29 U.S.C. § 1144 (emphasis added). Aside from the express preemption clause under Section 514(a), the Supreme Court has interpreted Section 502 of ERISA, 29 U.S.C. § 1132, to have preemptive effect. *See, e.g., Davila*, 542 U.S. at 208-10. Section 502 limits judicial claims that may be brought and remedies a plaintiff may recover under ERISA and may preempt a state law cause of action. As noted, this section creates a civil enforcement scheme that allows a participant or beneficiary of a plan to bring a civil action for various reasons, including "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." If a plaintiff seeks to bring a state law claim is "within the scope" of Section 502(a), the state law claim can be preempted. A discussion of the preemption and Section 502 of ERISA is beyond the scope of this report.

[74] N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co. 514 U.S. 645, 657 (1995).

[75] *See, e.g.,* Soehnlen v. Fleet Owners Ins. Fund, 844 F.3d 576, 589 (6th Cir. 2016) (ERISA preempts state laws that among other things, "mandate employee benefit structures or their administration" or "bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself.") (citing Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp., 399 F.3d 692, 698 (6th Cir. 2005)).

[76] *See, e.g.,* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1982).

[77] Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001).

[78] *Shaw*, 463 U.S. at 85-100.

[79] *Egelhoff*, 532 U.S. at 144.

[80] *Id*. at 148.

maintained that uniformity is impossible if plans are subject to different legal obligations in different states.[81]

A state law has a "reference to" an ERISA plan if it acts "immediately and exclusively" on ERISA plans, or if the existence of such a plan is essential to the law's operations.[82] In *Mackey v. Lanier Collection Agency & Service*, the Court evaluated a Georgia statute governing the garnishment of funds from ERISA plans.[83] The Court held that ERISA preempted the state statute that specifically exempted ERISA plans under state garnishment procedures.[84] The Court declared that "any state law which singles out ERISA plans, by express reference, for special treatment is pre-empted."[85]

Despite the broad scope of ERISA's express preemption clause, the Supreme Court has articulated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."[86] For instance, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, insurance companies providing services to ERISA-governed plans challenged a state law that required the plaintiff insurers to pay hospital surcharges.[87] Although the state law at issue triggered higher costs for ERISA plans, the Court upheld the law, concluding it had an "indirect economic influence" that did not bind administrators to particular choices with respect to a plan.[88] More recently, in *Rutledge v. PCMA*, the Court examined the validity of an Arkansas statute that generally regulated pharmacy benefit manager (PBM) reimbursement amounts to pharmacies, including reimbursement for drugs provided to patients through ERISA plans.[89] In concluding that the state law was not preempted, the Court affirmed that the state law "amounts to cost regulation" and is not subject to ERISA preemption, even if the law indirectly affects costs or alters incentives for providing benefits in ERISA-governed plans.[90]

There are also statutory exceptions to ERISA preemption, including exceptions that explicitly preserve aspects of the states' traditional role in regulating certain fields. For example, historically, insurance matters were primarily regulated at the state, rather than the federal, level.[91] Under ERISA's "savings clause," states may enforce any "law . . . which regulates insurance, banking, or securities."[92] Thus, the savings clause generally permits states to regulate entities in these covered industries without running afoul of ERISA's preemptive scheme. One key Supreme

[81] *Id*. Additionally, in *Gobeille v. Liberty Mutual Insurance Co*., 577 U.S. 312 (2016), the Supreme Court concluded in part that a Vermont law that required employer-sponsored health plans and other entities to report health care claims information for inclusion in an all-payer claims database had an impermissible connection with ERISA plans. Citing ERISA's extensive reporting, disclosure, and recordkeeping requirements, the Court held that Vermont's reporting regime "imposes duties that are inconsistent with the central design of ERISA, which is to provide a single uniform national scheme for the administration of ERISA plans without interference from laws of the several States…." *Id.* at 326.

[82] *See, e.g.*, Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., 519 U.S. 316, 325 (1997).

[83] 486 U.S. 825 (1988).

[84] *Id.* at 830.

[85] *Id.* at 838, n.12.

[86] *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1982).

[87] N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co, 514 U.S. 645 (1995).

[88] *See id.* at 659–60.

[89] Rutledge v. Pharm. Care Mgmt. Ass'n, 592 U.S. 80 (2020).

[90] *Id*. at 86–88.

[91] *See generally* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (addressing federal and state roles in insurance regulation).

[92] 29 U.S.C. § 1144(b)(2)(A).

Court case addressing the savings clause is *Kentucky Association of Health Plans, Inc. v. Miller*, in which the Supreme Court found that Kentucky's "any willing provider" laws, which prohibited insurers from discriminating against a health care provider willing to meet the insurer's criteria for participation in the health plan, were saved from ERISA preemption.[93]

Application of the savings clause is cabined by what is commonly referred to as ERISA's "deemer clause," which generally provides that an employee benefit plan governed by ERISA shall not be "deemed" an insurer, bank, trust company, investment company, or a company engaged in the insurance or banking business in order to be subject to state law (and accordingly, avoid ERISA preemption).[94] In *FMC v. Holliday*, the Supreme Court found that a Pennsylvania law that prevented subrogation[95] when applied to a self-funded health plan was preempted by ERISA by virtue of the deemer clause.[96] In its decision, the Court held that although the statute did "relate to" an ERISA benefit plan, the law fell within the ambit of the savings clause because the law controlled the terms of insurance contracts by invalidating any subrogation provisions that they contain.[97] However, because the plan in question was a self-funded plan (i.e., it did not offer benefits through health insurance), the Court concluded that the plan could not be "deemed" an insured plan for the purpose of state regulation.[98]

ERISA and Recent Supreme Court Litigation

The Supreme Court has reviewed numerous ERISA cases, and these decisions have affected the application of private-sector employee benefit plan regulation and the retirement, health, and other benefits provided to plan participants. On January 22, 2025, the Court heard oral arguments in *Cunningham v. Cornell University*, a lawsuit involving the necessary "ingredients" for alleging a prohibited transaction violation against plan fiduciaries. The Court is also considering whether to hear *Mulready v. PCMA*, a case about federal preemption of state laws governing PBM practices. This section of the report provides background and selected considerations for Congress relating to these pending cases.

Requirements for Viable Prohibited Transaction Claims Against Plan Fiduciaries: *Cunningham v. Cornell University*

Background. For the past several years, there has been extensive litigation over whether ERISA retirement plan fiduciaries imprudently selected or failed to monitor plan investments with "excessive fees" that underperformed alternative, lower-priced investments.[99] Excessive fee litigation has also involved legal challenges relating to plan service providers and claims that

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[93] 538 U.S. 329 (2003). In finding that the any willing provider laws "regulated insurance," the Court departed from reasoning it had used in earlier savings clause cases, and articulated a new two-part test. Under this test, a state law falls within the ambit of the savings clause if it is "specifically directed toward" the insurance industry and "substantially affects the risk pooling arrangement between the insurer and insured." *See id*. at 334–38.

[94] 29 U.S.C. § 1144(b)(2)(B).

[95] *Subrogation* has been defined as "the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy." BLACK'S LAW DICTIONARY (12th ed. 2024). In other words, a subrogation provision could require a health plan participant to reimburse the plan for medical costs that the plan had paid, if the member recovers on a claim in a liability action against a third party.

[96] 498 U.S. 52 (1990).

[97] *Id*. at 60–61 (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 740–741).

[98] *See FMC*, 498 U.S. at 64. *See also* discussion *supra* note 27.

[99] *See generally* JAYNE E. ZANGLEIN & SEAN M. ANDERSON, ERISA LITIGATION (2021) (ebook).

fiduciaries improperly paid exorbitant amounts to providers to administer 401(k) or other defined contribution plan benefits.[100] In these cases, plan participants have alleged that plan fiduciaries breached their duties by paying unnecessarily high recordkeeping and/or investment management fees and expenses, which substantially lowered the amounts in the participants' retirement accounts.[101] Lower courts have reached varying conclusions in these lawsuits, and some litigating parties have reached multimillion-dollar settlements.[102]

Beginning around 2016, there was a swell of excessive fee litigation involving 403(b) plans, a type of defined contribution plan used by certain educational institutions and tax-exempt organizations.[103] In these cases, plan participants have alleged, among other things, that university plan sponsors breached their fiduciary duties by imprudently subjecting the plans to excessive recordkeeping expenses and failing to remove overpriced and underperforming investments from larger suites of more reasonable investment offerings.[104] In a case that reached the Supreme Court, *Hughes v. Northwestern University*, the Court emphasized that to meet their duty of prudence, plan fiduciaries must continuously monitor defined contribution plan investments and remove imprudent investments from the plan, even if the plan offers an extensive range of options in its investment lineup.[105]

Additionally, in some excessive fee cases, plan participants have claimed that fiduciaries violated ERISA by causing plans to engage in prohibited transactions, in which fiduciaries entered into agreements with investment service providers who were overpaid for their work.[106] As discussed earlier in this report, under ERISA, a prohibited transaction occurs when a fiduciary causes a plan to enter into a transaction with a "party in interest," including plan service providers, unless an exemption is met.[107] Under one relevant exemption, the Act generally allows for "reasonable arrangements" for plan services with a party in interest that are necessary for plan operation, but only if "reasonable compensation" is paid for such arrangements.[108] The ERISA statute does not define the bounds of what constitutes reasonable compensation, but regulations specify that a determination of what compensation is reasonable depends on the particular facts and circumstances of each arrangement.[109]

In *Cunningham v. Cornell University*, current and former university employees who participate in the university's "jumbo" retirement plans brought a class action lawsuit against the university and

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[100] *See* WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 9.15 (8th ed. 2020).

[101] *See generally id*.

[102] *See generally* ZANGLEIN & ANDERSON, *supra* note 99; *401(k) Excessive Fee Litigation Spiked to 'Near Record Pace' in '24*, PLAN ADVISOR (Jan. 13, 2025), https://www.planadviser.com/401k-excessive-fee-litigation-spiked-near-record-pace-24/.

[103] *See* Jacklyn Wille, *Scorecard: College Retirement Plan Litigation Three Years Later*, BLOOMBERG LAW (Sept. 25, 2019), https://news.bloomberglaw.com/employee-benefits/scorecard-college-retirement-plan-litigation-three-years-later.

[104] *See, e.g*., Amended Complaint, Sacerdote v. N.Y. Univ., No. 1:16-cv-06284 (S.D.N.Y. Nov. 9, 2016), ECF No. 39; Second Amended Complaint, Cassell v. Vanderbilt Univ., No. 3:16-cv-02086 (M.D. Tenn. June 6, 2018), ECF No. 102; Second Amended Complaint, Henderson v. Emory Univ., No. 1:16-cv-02920 (N.D. Ga. Dec. 20, 2017), ECF No. 108.

[105] Hughes v. Northwestern Univ., 595 U.S. 170, 173 (2022).

[106] *See, e.g*., Sweda v. Univ. of Pa, 923 F.3d 320 (3d Cir. 2019).

[107] 29 U.S.C. § 1106.

[108] *Id.* § 1108(b)(2).

[109] 29 C.F.R. § 2550.408c-2.

other parties involved in the plan's management.[110] Most relevant to pending Supreme Court litigation, participants claimed that the plan sponsor and its fiduciaries engaged in certain prohibited transactions that paid the plans' service providers unreasonably high fees.[111] In their complaint, participants asserted that the defendants entered into an agreement with the providers for overpriced recordkeeping and other services for the plan and caused the plan to enter into a prohibited transaction.[112] The U.S. District Court of the Southern District of New York rejected these arguments and granted the defendants' motion to dismiss the plaintiffs' prohibited transaction claims, and the U.S. Court of Appeals for the Second Circuit affirmed this portion of the district court's judgment.[113]

In its decision, the appeals court concluded that to plead a violation of the ERISA's prohibited transaction requirements at issue in the case, a plaintiff must plausibly allege not only that the plan engaged in a transaction with a party in interest for services, but also that the transaction did not meet an exemption (e.g., that the transaction involved unreasonable compensation).[114] The appeals court explained, among other things, that ERISA's text supported this interpretation, and that, under the Act, the prohibited exemptions are "so integral . . . to the offense that it is part of the offense's ingredients."[115] To hold otherwise, the appeals court found, would mean that all payments that plan fiduciaries make to service providers in exchange for plan services would be presumptively prohibited.[116] As the court maintained, such an outcome would make it impossible to outsource plan administration, and "would be inconsistent with the Supreme Court's recognition that ERISA represents a careful balancing intended to induce employers to offer benefits by assuring a predictable set of liabilities."[117] Other appellate courts have reached different conclusions on this issue.[118] The plaintiffs in *Cunningham* petitioned the Supreme Court

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[110] The Petition for a Writ of Certiorari filed with the Supreme Court indicates the retirement plans serve over 30,000 participants and contain more than $3.3 billion in assets. *See* Petition for a Writ of Certiorari at 6, Cunningham v. Cornell Univ., No. 23-1007 (U.S. Apr. 12, 2024).

[111] In their petition for Supreme Court review, plan participants describe aspects of the arrangement that, in their view, generated the unreasonably high recordkeeping fees:

> There are two common models for collecting recordkeeping fees. First, plans can pay a flat fee indexed to the number of Plan participants. Because of economies of scale, jumbo plans generally obtain lower flat fees than smaller plans. Second, plans can choose a revenue sharing model, with fees calculated based on a set portion of plan assets. As assets grow, fees grow, even if the number of participants and the services provided do not increase. While there is no ceiling, there is typically a floor—since recordkeepers often demand additional direct payments if assets decline below a certain level. Respondents here opted to pay recordkeeping fees through a revenue sharing, rather than flat fee, model.

See id. at 7.

[112] *See* Corrected Amended Complaint at 128–29, Cunningham v. Cornell Univ., No. 16-CV-6525 (S.D.N.Y Feb. 24, 2017), ECF No. 81.

[113] Memorandum and Order at 26, Cunningham v. Cornell Univ., No. 16-CV-6525, 2017 WL 4358769, at *13 (S.D.N.Y. Sept. 29, 2017), *aff'd*, 86 F.4th 961 (2d Cir. 2023), *cert. granted*, 145 S. Ct. 118 (2024).

[114] Cunningham v. Cornell Univ., 86 F.4th at 973–79.

[115] *See id.* at 975.

[116] *See id.*

[117] *Id.* at 976.

[118] *See, e.g.*, Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 601 (8th Cir. 2009) (plaintiffs stating a viable prohibited transaction claim by alleging that plan sponsor caused the plan to enter into an agreement with a party in interest that received "undisclosed amounts of revenue sharing payments in exchange for services rendered to the [p]lan"); *Cf.* Sweda v. Univ. of Pa., 923 F.3d 320, 337 (3d Cir. 2019) ("Reading § 1106(a)(1) as a per se rule barring all transactions between a plan and party in interest would miss the balance that Congress struck in ERISA, because it would expose fiduciaries to liability for every transaction whereby services are rendered to the plan.").

for review of this issue, and the Court agreed to hear the case.[119] Oral arguments were held on January 22, 2025.

Considerations for Congress. Pursuant to existing Supreme Court jurisprudence, for a plaintiff's claim to survive a motion to dismiss, the complaint must contain "sufficient factual matter" to state a claim that is "plausible on its face."[120] In *Cunningham*, the Supreme Court may clarify the necessary elements for "plausibility" in pleading ERISA prohibited transaction claims, particularly those involving third-party service agreements. Federal courts generally determine whether a plaintiff has made a plausible claim before discovery occurs, at a point in which plaintiffs may not yet have access to certain information about a plan's financial arrangements. Accordingly, in pleading a prohibited transaction claim in an excessive fee case, if a plaintiff must plausibly allege both that a prohibited transaction occurred *and* that such transaction did not meet an exemption, it may be more difficult for plaintiffs to bring a viable claim for a prohibited transaction violation. Some legal commentators suggest that such an outcome is warranted and consistent with congressional intent, as a means of curbing meritless claims and restricting unnecessary litigation expenses on employers offering retirement plans.[121] Other legal commentators, however, posit that a more rigorous pleading standard for prohibited transaction claims would undercut the role that participants and beneficiaries play in addressing potential plan mismanagement, as part of ERISA's enforcement scheme.[122]

Given, as federal reports indicate, that the level of fees and expenses in a retirement plan may affect retirement savings growth, and the prevalence of ERISA excessive fee litigation, Members of Congress may have interest in the outcome of the *Cunningham* case.[123] Congress may choose, should it deem it appropriate, to consider legislation that would establish the requisite pleading standards in these types of excessive fee cases, under which a plaintiff's claim could withstand a motion to dismiss.

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[119] SUPREME COURT OF THE UNITED STATES, GRANTED & NOTED LIST, OCTOBER 2024 TERM CASES FOR ARGUMENT, No. 23-1007 (2024), https://www.supremecourt.gov/qp/23-01007qp.pdf. *See also* SUPREME COURT OF THE UNITED STATES, NO. 23-1007, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-1007.html.

[120] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). *See also* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[121] *See, e.g*., Brief for the American Benefits Council, the ERISA Industry Committee, and The Spark Institute as Amici Curiae Supporting Respondents at 4, Cunningham v. Cornell Univ., No. 23-1007 (U.S. Jan. 3, 2025) ("Petitioner's rule would wreak havoc on ordinary plan operations. The threat of baseless litigation immune from dismissal would make some qualified individuals reluctant to serve as fiduciaries altogether . . . . Sponsors that offer benefit plans would find themselves the target of meritless lawsuits that draw attention and dollars away from employees' actual benefits. . . .").

[122] *See, e.g.*, Brief for Amici Curiae AARP and AARP Foundation as Amici Curiae Supporting Petitioners at 14, Cunningham v. Cornell Univ., No. 23-1007 (U.S. Nov. 26, 2024) ("This Court thus should reject the Second Circuit's new heightened pleading standard for section 1106(a) claims because it would add unnecessary obstacles to plan participants' ability to protect their interests as well as run afoul of Congress's intent to establish a robust enforcement scheme under the statute.").

[123] *See e.g*., U.S. Gov't Accountability Off., GAO-21-357, 401(k) Retirement Plans, Many Participants Do Not Understand Fee Information, but DOL Could Take Additional Steps to Help Them 1 (2021)("[O]ur prior work has shown that even seemingly small fees, such as a 1 percent annual charge can significantly reduce 401(k) plan participants' retirement savings, even as investment returns may grow the savings overall."); U.S. Gov't Accountability Off., GAO-07-21, 401(k) Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees 7 (2006).

State PBM Laws and ERISA Preemption: *Mulready v. Pharmaceutical Care Management Association (PCMA)*

Background. Alongside recent federal efforts to combat escalating prescription drug prices, state governments have sought to address these prices within their borders.[124] Some state efforts involve regulation of PBMs, companies that facilitate the purchase of drugs through the pharmaceutical distribution chain and administer prescription drug coverage on behalf of health insurers, employers, and others.[125] Private health insurance plans and other health care payers may contract with PBMs to design and administer prescription drug benefit plans.[126] In doing so, PBMs design drug formularies, negotiate prescription drug prices with manufacturers, and contract with pharmacies to dispense drugs to enrollees. As states have enacted legislative measures intended to hold PBMs accountable for their role in the pharmaceutical marketplace,[127] PBMs have challenged some of these measures on the basis that they are preempted by federal law, including ERISA.[128] PBM advocates have claimed that ERISA preempts certain state PBM laws, in part because the laws have a direct regulatory effect on ERISA-governed plans, plan design, and how these plans manage drug benefits.[129]

As noted above, in 2021, the Supreme Court addressed the interplay between state PBM laws and ERISA preemption in *Rutledge v. PCMA*. At issue in *Rutledge* was an Arkansas statute that establishes mechanisms designed to anchor PBM pharmacy reimbursement rates to the pharmacies' drug acquisition costs.[130] A PBM trade association sued the state, claiming, among other things, that ERISA preempted the Arkansas state law as it applied to PBMs that provide drug benefit services to ERISA plans.[131] In rejecting these claims and concluding that ERISA does not preempt Arkansas's PBM law, the Supreme Court employed the Court's traditional test for ERISA preemption: whether the state law has "a connection with or reference to" an ERISA plan.[132]

In discussing why the Arkansas law lacked a prohibited "connection with" an ERISA plan, the Court explained that ERISA is "primarily concerned with preempting laws that require providers to structure benefit plans in particular ways," such as requiring payment for a specific benefit.[133] ERISA does not, the Court found, preempt state requirements that "merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage."[134] However, consistent with other ERISA preemption decisions, the Court also

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[124] See, e.g., CRS In Focus IF12203, *Selected Health Provisions of the Inflation Reduction Act*, by Laura A. Wreschnig (2022); National Academy for State Health Policy, 2025 STATE LEGISLATION TO LOWER PRESCRIPTION DRUG COSTS, https://nashp.org/state-tracker/2025-state-legislation-to-lower-prescription-drug-costs/.

[125] *See generally*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106898, PRESCRIPTION DRUGS, SELECTED STATES' REGULATION OF PHARMACY BENEFIT MANAGERS (2024).

[126] *See generally*, CRS Legal Sidebar LSB11080, *Pharmacy Benefit Managers: Current Legal Framework*, by Hannah-Alise Rogers, Jennifer A. Staman, and Alexander H. Pepper (2023).

[127] *See generally*, *State Tracker 07-10-23, State Pharmacy Benefit Manager Legislation*, NATIONAL ACADEMY FOR STATE HEALTH POLICY (Oct. 21, 2024), https://nashp.org/state-tracker/state-pharmacy-benefit-manager-legislation/.

[128] *See, e.g.*, Rutledge v. Pharm. Care Mgmt. Ass'n, 592 U.S. 80 (2020).

[129] *See, e.g.*, Brief for Respondent, Rutledge v. Pharm. Care Mgmt. Assoc., 592 U.S. 80 (2020) (No. 18-540), 2020 WL 1478581.

[130] Rutledge v. Pharm. Care Mgmt. Assoc., 592 U.S. 80, 83–85 (2020); 2015 Ark. Acts 900.

[131] *Rutledge*, 592 U.S. at 85.

[132] *Id.* at 86.

[133] *Id.* at 86–88.

[134] *Id.* at 88.

recognized limits on this flexibility and generally explained that state laws cannot compel ERISA plans to offer a certain type of coverage or administer benefits in a particular manner.[135] The Court further determined that the Arkansas law did not impermissibly "refer to" ERISA plans because ERISA plans are unrelated to the state law's operation—the law applies to PBMs regardless of whether they manage ERISA plans or not.[136]

In the wake of *Rutledge*, courts continue to address questions related to ERISA preemption and state PBM laws. One such case is *PCMA v. Mulready*, a legal challenge to Oklahoma's PBM requirements that govern financial arrangements between PBMs and pharmacies.[137] Among other requirements, the state law at issue generally restricts PBMs from using certain discounts to encourage insured individuals to use preferred, in-network pharmacies, and compels PBMs to design networks so that a certain percentage of covered individuals live within a set distance to a participating brick and mortar pharmacy.[138] Additionally, the state law includes an "any willing provider" provision, which requires PBMs to allow any pharmacy willing to accept a PBM's terms and conditions in its preferred pharmacy network.[139]

After a district court concluded that the Oklahoma PBM laws withstood ERISA preemption, the U.S. Court of Appeals for the Tenth Circuit reversed the decision and concluded that ERISA superseded the state requirements.[140] In its opinion, the appeals court reasoned that the Oklahoma laws "effectively abolish[ed] the two-tiered network structure" by preventing PBMs from contracting only with certain pharmacies (e.g., mail-order pharmacies) as a means of controlling costs.[141] The appeals court further explained that the network requirements as applied to ERISA plans were "quintessential state laws that mandate benefit structures," and thus, forbidden by the Act.[142] The appeals court also distinguished the Oklahoma laws from those at issue in *Rutledge*, noting that not only did the Oklahoma laws impose higher costs on PBMs, they also prevented PBMs from offering plans with certain network designs.[143] Subsequently, Oklahoma's Attorney General filed a petition for Supreme Court review, and this petition is currently pending.[144] The Court has invited the U.S. Solicitor General to file a brief in *Mulready* expressing the views of the United States on the case, but a brief has yet to be filed.[145]

Considerations for Congress. Some federal lawmakers have expressed support for enacting federal measures designed to regulate PBMs, including measures intended to make their practices

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135 *Id.* at 89.

136 *See id*. at 88–89.

137 *See* PCMA v. Mulready, 78 F.4th 1183 (10th Cir. 2023). *See also, e.g*., Alaska v. Express Scripts, Inc., No. 3:23-cv-00233, 2024 WL 2321210, at *9–11 (D. Alaska May 22, 2024).

138 OKLA. STAT. tit. 36, § 6963(E) (2024); OKLA. STAT. tit. 36, § 6961(A)–(B) (2024).

139 *See* OKLA. STAT. tit. 36, § 6962(B)(4) (2024).

140 Pharm. Care Mgt. Assn. v. Mulready, 598 F. Supp. 3d 1200 (W.D. Okla. 2022), *rev'd and remanded*, 78 F.4th 1183 (10th Cir. 2023).

141 *Id.* at 1199.

142 *Id.*

143 *Id.* at 1199–1200.

144 Petition for Writ of Certiorari, Mulready v. Pharm. Care Mgmt. Assoc., No. 23-1213 (U.S. May 10, 2024).

145 Notably, in an earlier brief filed with the Tenth Circuit, the Solicitor General expressed the position that ERISA preempted Oklahoma's pharmacy network requirements, but the requirements were largely exempted from preemption under ERISA's savings clause for insurance. *See* Brief for the United States as Amici Curiae Supporting Neither Party Urging Affirmance in Part and Reversal in Part, Pharm. Care Mgmt. Assoc. v. Mulready, No. 22-6074 (U.S. Apr. 10, 2023). The Tenth Circuit did not address this savings clause issue in its opinion.

more transparent and restrict how these entities may be compensated.[146] At the same time, according to recent reports, all states have passed some type of legislation to regulate PBMs and their business practices.[147] Current state PBM requirements vary, but these measures include licensure and registration requirements, transparency measures, and requirements relating to consumer or pharmacy protections and pharmacy reimbursement.[148] Should Congress decide to enact PBM-related legislation, questions may arise regarding the interplay between such state and federal provisions.

While the Court in *Rutledge* affirmed that some types of state PBM laws may not be subject to ERISA preemption, the Court may further clarify ERISA's preemptive reach with respect to state PBM laws, should it choose to grant review in *Mulready*. Additionally, federal proposals have been introduced in recent Congresses to regulate PBM activities with respect to ERISA plans. Examples include H.R. 5378, the Lower Costs, More Transparency Act in the 118th Congress, which would have compelled entities that provide PBM services and other parties to provide detailed information on prescription drug spending to ERISA plans.[149] This legislation would not have amended ERISA's preemption clause or expressly addressed the degree to which states may regulate a PBM's functions in service to ERISA plans. Congress may choose, should lawmakers deem it appropriate, to explicitly address this issue in any future legislation.

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[146] *See, e.g.*, Sigi Ris, *Cassidy, Sanders Say PBM Reform a Priority for Health Committee*, INSIDE HEALTH POLICY (Jan. 21, 2025), https://insidehealthpolicy.com/daily-news/cassidy-sanders-say-pbm-reform-priority-health-committee.

[147] *See e.g*., U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106898, PRESCRIPTION DRUGS, SELECTED STATES' REGULATION OF PHARMACY BENEFIT MANAGERS (2024).

[148] *See id.*

[149] H.R. 5378, 118th Cong. § 105 (as passed by House, Dec. 11, 2023).