McGOHAN BRABENDER'S

COMPLIANCE IN MOTION

AUGUST 2025

District Court Temporarily Blocks Arkansas Law Prohibiting PBMs from Owning Pharmacies

On July 28, 2025, the US District Court for the Eastern District of Arkansas temporarily blocked the new Arkansas law that would prohibit pharmacy benefit managers (PBMs) from having an ownership interest in retail pharmacies operating in the state.

WHO THIS APPLIES TO:

- Employers with prescription drug benefits covering prescriptions filled in retail or mail order pharmacies located in Arkansas.

GO DEEPER:

The Court reasoned that the law "likely violates the Commerce Clause and it is likely preempted by TRICARE." The judge stated the law "appears to overtly discriminate against plaintiffs as out-of-state companies, and the state has failed to show that it has no other means to advance its interests."

As a result, a preliminary injunction was granted to halt enforcement of the law on its scheduled January 1, 2026 effective date until disposition of this case is finalized.

Practical Impact to Employers:
Employers do not need to take action at this time but may want to analyze how many plan participants access pharmacies in Arkansas owned by a PBM, including specialty pharmacies and mail order pharmacies. This law could have caused some pharmacies to lose their license to operate in AR starting in 2026. This could have caused disruption to employee pharmacy accessibility until the ownership of certain retail pharmacy structures changed, in which case employers sponsoring benefits may have wanted to analyze the potential impact of pharmacy closures to plan participants and make necessary accommodations. However, this injunction means licenses cannot be suspended or revoked under this law's requirements until the merits of this case are settled.

FEDERAL UPDATES

Affordability Percentage Increased for Plan Years Beginning in 2026

On July 18, 2025, the IRS announced a **9.96% affordability percentage for plan years starting in 2026** *(an increase from 9.02% for plan years starting in 2025)*. This substantial increase is due to a recent change in the indexing methodology.

WHO THIS APPLIES TO:

- Applicable large employers (ALEs) with 50+ full-time and equivalent employees in the prior calendar year (including related employers under common ownership or control who must combine their employee counts). Any fully-insured or self-funded medical plan that provides minimum value, or the ALE's individual coverage health reimbursement arrangement (ICHRA), must be analyzed to determine affordability.

GO DEEPER:

This affordability percentage is used by ALEs to determine whether the **lowest-cost single medical plan providing minimum value** is affordable for each full-time employee. Affordability is not required to be analyzed for additional plan options provided by ALEs or dependent coverage tiers.

There are three affordability safe harbors an ALE can use to determine affordability for each full-time employee:

- Federal Poverty Level (FPL)
- Rate of Pay
- W-2

Using FPL: A calendar year 2026 plan will be FPL affordable at $129.89/month *($16.69/month more than the $113.20/month for 2025 calendar year FPL affordability)*. If coverage costs $129.89 or less, the employer's offer of coverage for the lowest cost plan for the self-only tier is automatically affordable for all employees eligible for that rate, regardless of their rate of pay or hours.

Using Rate of Pay: As an example of the rate of pay safe harbor, if the lowest paid full-time employees make $10 per hour, the employer would use 130 hours per month times $10 per hour (which is $1,300 per month).

- For the plan year that began in 2025, the employee could pay no more than $117.26/month (9.02% of $1,300).
- For the plan year beginning in 2026, the employee could pay no more than $129.48/month (9.96% of $1,300).

Note, plan years starting in 2025 would need to use the 2025 affordability percentage, which is 9.02%, for the entire plan year.

	2024	2025	2026
Affordability percentage	**8.39%**	**9.02%**	**9.96%**
48-States Federal Poverty Line (FPL)	$15,060	$15,650	Expected 01/17/26
FPL Affordable Calendar Year Plan	$101.93	$113.20	$129.89
FPL Affordable Non-Calendar Year Plan	$105.29	$117.63	TBD Jan 2026

Practical Impact to Employers

An ALE wanting to avoid employer shared responsibility penalties under §4980H(b) needs to decide which affordability safe harbor(s) to use and ensure premium contributions are designed properly before the plan's start date, and NOT wait to determine during ACA reporting. While the affordability percentage is increasing substantially for 2026, so is the potential penalty for an employee waiving an unaffordable offer. So, it is becoming more important to close affordability gaps to minimize penalty exposure.

ALE Penalties Increased for 2026

On July 22, 2025, the IRS announced **ALE penalties will increase over 15% for 2026.**

Note: When we calculated this in June, the (b) penalty was miscalculated due to one digit being mistyped into a calculator. The (a) penalty was correctly calculated to be $3,340, but the (b) penalty will be $5,010, not $5,310.

WHO THIS APPLIES TO:

- Applicable large employers (ALEs) with 50+ full-time and equivalent employees in the prior calendar year *(including related employers under common ownership or control who must combine their employee counts).*

GO DEEPER:

The Affordable Care Act (ACA) subjects ALEs to potential employer shared responsibility penalties (ESRP) under §4980H rules when they do not offer affordable, minimum value coverage to full-time (FT) employees (and their dependents to the end of the month they turn 26). There is no requirement to offer coverage to spouses.

- Full-time is defined as those with 30 or more hours of service per week, which equates to 130 hours in a calendar month (30 hours per week × 52 weeks ÷ 12 months = 130 hours per month).
- Hours of service include all hours which are or should be paid, including paid time off.

Table of the ALE Penalties for 2024, 2025, and 2026:

	2024	2025	2026
§4980H(a) For failing to offer to 95% of FT (and their dependents	$2,970 $247.50/mo	$2,900 $241.67/mo	$3,340 $278.33/mo
§4980H(b) For not offering affordable, minimum value coverage	$4,460 $371.67/mo	$4,350 $362.50/mo	$5,010 $417.50/mo

§4980H(a) penalties can be avoided each month the ALE offers medical coverage to at least 95% of their full-time employees and their dependents (not required to offer to spouses).

- For an ALE with 100 full-time employees, offering to 95% of full-time employees would mean offering coverage to all but 5 full-time employees (and their dependents).
- Employees not in a regular full-time position may be deemed full-time for a month if their hours hit 130 in the calendar month, and seasonal full-time typically are deemed full-time under these rules.

- For any month the ALE fails this requirement, any one full-time employee who buys public Exchange/ Marketplace coverage with a tax credit will trigger the §4980H(a) penalty for all full-time employees less the ALE's allocable share of 30 employees (the 30-employee reduction is shared among ALE members in a controlled group or affiliated service group).
- For any month the ALE meets this requirement, the potential penalty under §4980H(a) serves as a cap for the potential penalties under §4980H(b).

§4980H(b) penalties can be avoided each month the full-time employees' offer of minimum value coverage meets an affordability safe harbor.

- ALE coverage only needs to be affordable on the lowest-cost single plan providing minimum value. Other plan options the employer might provide do not have to be affordable, and dependent tiers do not have to be affordable.
- If the employer is meeting the requirements to avoid the §4980H(a) penalty, then a full-time employee who waives coverage that is not affordable and minimum value to buy public Exchange/ Marketplace coverage with a tax credit will trigger the §4980H(b) penalty, which is only assessable on that specific employee for that specific month.
- Often, an ALE's coverage will be affordable for most employees earning a certain rate of pay, but unaffordable for those full-time employees earning less. So, while the dollar amount of the penalty is larger than that charged under §4980H(a), it is typically multiplied by a much smaller number of full-time employees.

ALEs self-report on forms 1094-C and 1095-C which employees are full-time, the offers made to each one, and whether the coverage offered was affordable and minimum value. The IRS then reconciles those reports with public Exchange Marketplace tax credits paid out to determine which ALEs to send ESRP letters to, approximately two years later.

Practical Impact to Employers

An ALE wanting to avoid employer shared responsibility penalties needs to ensure they are properly identifying full-time employees throughout the year and offering affordable, minimum value coverage to them. The potential penalties are increasing substantially (over 15% in just one year). So, it is becoming more important to closely monitor full-time status to identify everyone that should be offered coverage, and close affordability gaps.

Benefit Provisions in the Budget Reconciliation Bill Signed into Law

On July 4, 2025, President Trump met his goal and signed a massive budget reconciliation bill into law. Due to Senate rules, it is no longer officially named the One, Big, Beautiful Bill Act. However, the bill includes a number of provisions impacting health and welfare plan sponsors and participants.

GO DEEPER:

The House's previous version of the bill included several provisions that addressed health savings accounts (HSAs), individual coverage HRAs (ICHRAs), and other benefits. The bill, as initially amended in the Senate, did not include any enhancements for HSAs or ICHRAs, but provided some enhancements to dependent care FSAs, education assistance, and tax credits for paid family and medical leave, adoption assistance, and employer-provided child care.

The bill, as signed into law by the president, saw some HSA updates added back to the bill, including a permanent fix for the issue of first dollar telehealth and HSA eligibility. These provisions are mentioned in more detail below and provide welcome relief to employers and employees. Bicycle commuter benefits, which were paused from 2017 through 2025, will not resume in 2026 as they are permanently removed from the tax code. The law also provides stronger enforcement of fraudulent employer retention tax credits which were provided during the pandemic and abused so heavily the program had to be paused for months. The law did not include any provisions to amend ICHRAs.

Benefit enhancements in the final law:

Permanent HSA Compatibility With:

- *2025: Low or No-Cost Telehealth* - This is effective retroactively to plan years starting after December 31, 2024. So, there is no compliance gap for employers who continued this practice after the previous law expired.
- *2026: Direct Primary Care (DPC)* - DPC meeting certain restrictions on cost and services *(also note DPC fees will be reimbursable from HSAs)*:
    - Cost limits: $150/month *(double for a family)*, indexed in future years.
    - Service limits: Primary care services provided by primary care providers, which specifically cannot include procedures that require the use of general anesthesia, prescription drugs other than vaccines, and laboratory services not typically administered in an ambulatory care setting.
- *2026: Bronze Level or Catastrophic Exchange Coverage* - Plans are compatible even if they are not structured to be an HSA-qualified high-deductible health plan *(QHDHP)*.

Expanded Tax Credits For:

- 2026: Paid family and medical leave (PFML)
- 2026: Employer-provided child care

Dependent Daycare FSA Increase:

- 2026: The Dependent Care Assistance Program (DCAP) annual cap rises from $5,000 *($2,500 if married filing separately) to $7,500 ($3,750 if married filing separately)*. No indexing for inflation.

Education Assistance Improvements:

- 2026: Student loan repayments are permanently allowed to be reimbursed through education assistance programs *(this had been set to expire at the end of 2025)*.
- 2027: The $5,250 annual limit will be indexed for inflation.

A new tax-favored employer-sponsored benefit is available starting in 2026:
Further IRS guidance is needed, but employers who are interested can begin discussing plans to adopt tax-favored employer contributions to Trump Accounts, up to $2,500 per employee per year, subject to indexing in future years. These are individual retirement accounts similar to IRAs for dependents and employees under age 18. The law says "requirements similar to" those for Dependent Daycare FSAs will apply, including the nondiscrimination rules.

Potential Impact to Employers:
While improvements to ICHRAs and other HSA enhancements did not make the final cut, that does not mean those benefit modernizations are on hold forever. A lot of those efforts have broad bipartisan support and may make their way back into other bills.

For now, employers know what benefit changes the final law provides and can plan accordingly.

- Employers may want to amend their QHDHPs retroactively to allow for first-dollar coverage of telehealth.
- Employers may want to make plans to amend the QHDHP for plan years starting in 2026 to state that DPC meeting certain cost and services criteria are not subject to the deductible.
  - Some employers may want to clearly state the $150 per month (double for a family) cost limit, and update annually thereafter for newly indexed amounts.
  - Other employers may want to just point to the Internal Revenue Code's indexing provision so annual updates to the plan document are not necessary and can just be mentioned in annual enrollment materials.
  - While qualifying DPCs "shall not be treated as a health plan" for HSA eligibility purposes starting in 2026, that does not necessarily change ERISA, COBRA and Affordable Care Act rules, which still treat an employer-sponsored DPC as a group

health plan. So, sponsoring and paying for DPC will require employers to ensure compliance with those other laws.

- Daycare FSA plan documents can be amended for 2026 to permanently begin allowing up to $7,500 per year (up to $3,750 for married filing separately).
    - This is a one-time amendment as the amount will not index in future years.
    - Employers do not have to allow the full $7,500, but these accounts do not have a way for employees to overdraw them and then leave employment, so most employers do adopt the full allowance.
    - However, an employer who routinely struggles with nondiscrimination testing at the $5,000 benefit level may have more issues increasing to $7,500, so a thoughtful approach is warranted.
- Education assistance programs are not required to allow reimbursement of student loan payments, but if an employer wants to allow, plan language review will need to occur to see if amendment is necessary. Indexing of the $5,250 annual limit does not begin until 2027.
- Employers may consider adoption of the newly created tax-favored benefit toward Trump Accounts, but additional guidance is needed from the administration.

Question of the Month:

With direct primary care (DPC) becoming HSA-compatible in 2026, what should employers consider when deciding if they want to sponsor a DPC for their employees?

Importantly, establishing a DPC benefit creates a group health plan, requiring compliance with ACA, COBRA, ERISA, and other laws. This means:

- Employees or dependents not enrolled in a medical plan cannot access the DPC
- The plan sponsor must have a plan document/SPD for the DPC
- The DPC will be subject to ERISA claims and appeals rights
- The DPC must be reflected on the Summary of Benefits and Coverage (SBC) or have its own SBC

Additionally, DPC is a self-funded health plan which is subject to PCORI, MHPAEA, RxDC, GCPCA, etc.

Employers must also be mindful of the cost limitations imposed for purposes of determining if the DPC is QHDHP/HSA-eligible. Any DPC with a monthly fee exceeding $150 for single coverage (or $300 for family coverage) or allowing the fee to cover more services than permitted under the new rules could not be adopted without jeopardizing employees' HSA eligibility.

Because of the complexity in establishing and administering a DPC as an employer-sponsored employee benefit plan, employers could consider increasing their HSA contribution to all employees and encouraging employees to join an individual DPC if they choose.

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REIMAGINING EMPLOYEE BENEFITS

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