HEALTHCARE PURCHASER ALLIANCE OF MAINE

Testimony of Trevor Putnoky
to the Joint Standing Committee on Health Coverage, Insurance and Financial Services

In Support of

LD 1906, An Act to Improve Accountability and Understanding of Data in Insurance Transactions

May 13, 2025

Good afternoon, Senator Bailey, Representative Mathieson, and Members of the Joint Standing Committee on Health Coverage, Insurance and Financial Services.

My name is Trevor Putnoky and I'm the President and CEO of the Healthcare Purchaser Alliance of Maine. The HPA is a nonprofit that represents the purchasers of health care in Maine. Our mission is to advance and support access to high-quality, affordable care. We have over 60 members, including some of the largest public and private employers and health trusts in Maine. Collectively, our members spend over a billion dollars annually providing health care for nearly one quarter of the commercially insured population in the state.

I'm here today to testify in strong support of LD 1906. I also want to thank Senator Bailey and others on this committee for sponsoring this important legislation.

Maine employers spend billions of dollars annually on healthcare coverage for employees and their families. Yet right now, few employers have the unfettered ability to review whether that substantial spend is being billed and paid correctly. While no company would pay a non-healthcare bill without at least a detailed invoice, that is exactly what employers are forced to do every day when it comes to the health plans they offer to their employees and their families.

This is because employers' contracts with third party administrators (TPAs) and pharmacy benefit managers (PBMs) typically include restrictive audit terms that make it impossible for purchasers to identify erroneous or over payments or to evaluate contract compliance. And while many of our members have tried to negotiate with their TPAs and PBMs to get these types of audit restrictions removed from their contracts, these efforts have been largely unsuccessful.

LD 1906 would address this problem by prohibiting TPAs and PBMs from including restrictive audit provisions in their contracts with employers and requiring them to provide employers with the data they need to undertake effective plan oversight and minimize overpayments.

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The Problem

Healthcare costs are a substantial expense for employers. Warren Buffet famously said in 2006 that "General Motors is a health and benefits company with an auto company attached" in reference to the fact that GM spent more on healthcare than steel,[1] and Starbucks's CEO noted in 2010 that his company's healthcare costs exceeded that of coffee.[2]

Not only is health care a major expense for employers and consumers alike, the processing of healthcare claims is extremely complex and billing errors are common. Billing advocates estimate that up to 80 percent of medical bills contain errors,[3] and one major auditing firm we spoke to reported that, on average, erroneous charges and overpayments comprise 2–4 percent of total healthcare benefit spend in their book of business. Across our members, that translates into $20-40 million dollars that could otherwise be used to reduce costs for Maine employees and their families. Healthcare costs are already too high; employers and consumers shouldn't be paying even more due to billing errors and other erroneous payments.

Further, self-funded employers have a fiduciary responsibility to pay reasonable plan costs and to make decisions in the best interest of their employees and dependents. Audits allow employers to confirm that their TPA and PBM are meeting all contractual terms, including financial performance guarantees. But in order for employers to conduct this type of basic, normal oversight, they must be able to audit their claims data. Several employers nationwide have been sued for failing to meet these foundational fiduciary responsibilities, and employers who are unable to perform robust audits are increasingly concerned that they will be next.

Unfortunately, employers' contracts with third party administrators (TPAs) and pharmacy benefit managers (PBMs) often include restrictive audit terms that make it impossible for purchasers to identify erroneous or over payments, or to evaluate contract compliance. Common restrictions include:

- Limits on the number of claims that can be audited, frequently fewer than 300 claims
- Allowing the TPA/PBM to select which claims are audited
- Limits on the data elements that can be included in the audit

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[1] Dave Chase, "You Run a Health-Care Business Whether You Like It or Not," *CFO*, November 7, 2017. Available at: https://www.cfo.com/news/you-run-a-health-care-business-whether-you-like-it-or-not/659705/.

[2] Beth Kowitt, "Starbucks CEO: 'We spend more on health care than coffee,'" *CNN Money*, June 7, 2010.Available at: https://money.cnn.com/2010/06/07/news/companies/starbucks_schultz_healthcare.fortune/index.htm.

[3] Kelly Gooch, "Medical Billing Errors Growing, Says Medical Billing Advocates of America," *Becker's Hospital Review*, April 12, 2016. Available at: https://www.beckershospitalreview.com/finance/medical-billing-errors-growing-says-medical-billing-advocates-of-america/.

- Limits on the types of analyses that can be conducted, including prohibiting extrapolation of findings
- TPA/PBM veto power over choice of auditor
- Restrictions on how a purchaser can compensate/pay their auditor
- Restrictions on the frequency of audits and the time period covered by the audit
- Inability to audit claims prior to claims being paid (pre-payment audit rights)

Our members tell us that being able to effectively audit their health plans is a top priority and a necessary tool to help minimize erroneous payments. With attempts to address this issue through contract negotiations unsuccessful, we are asking the Legislature to enact a statutory solution.

The Solution

Based on two bills recently enacted in Indiana,[4] LD 1906 will protect employer audit rights. It will prohibit TPAs and PBMs from including restrictive auditing provisions in their contracts with self-insured purchasers, and it will ensure that purchasers have the data they need to be confident that payments made on their behalf are correct. Currently, self-insured employers are often denied access to the granular details needed to validate that they are not paying more than they should. For instance, while most employers have access to the amounts billed to their plan by their carrier or PBM, few can see what the providers were actually paid. It will also help them to identify and potentially recover erroneous payments made on their behalf. LD 1906 will create a clear line of sight for employers that strengthens their ability to meet their fiduciary responsibility to perform due diligence and plan oversight. Further, these changes will allow employers to confirm that all contract terms and financial guarantees are being met, and ensure that systemic problems identified during audits are corrected moving forward.

The bill would also allow for pre-payment review of high-cost claims above $50,000. These claims represent just 0.1 percent of total claims in HPA's book of business, but account for more than 16 percent of our members' total plan spend. We believe it's important for employers to have the ability to review this small—but costly—subset of claims before they're paid, because it's a lot easier to stop an erroneous payment before it goes out the door than it is to try to recover those erroneously paid dollars after they've been paid. Some may be concerned that this could delay payment of claims, but we believe the reviews can be turned around quickly once itemized billing information is provided. And that itemized information should be readily available, as providers need it to develop the billed amounts included in their claim submissions to carriers. And again, these pre-payment reviews would only impact a fraction of a percent of total claims.

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[4] Indiana General Assembly, House Bill 1259. Available at: https://iga.in.gov/legislative/2024/bills/house/1259/details. Indiana General Assembly, House Bill 1003. Available at: https://iga.in.gov/legislative/2025/bills/house/1003/details.

I also want to emphasize that employers—not carriers—generally bear the cost of these audits, including any costs incurred by their TPA or PBM to provide the materials outlined in the bill. All that employers are asking for is access to their data, so that they can meet their fiduciary duty to ensure plan dollars are managed prudently.

We don't take this step lightly. We believe that contract terms are usually best left to the parties to negotiate. And, in fact, our members have tried to negotiate with their TPAs and PBMs to get these types of audit restrictions removed from their contracts. Unfortunately, those efforts have been largely unsuccessful. Even some of our largest members, with thousands of employees, have been unable to get audit restrictions eliminated, let alone the many smaller employers who have even less negotiating power with their TPAs and PBMs. For example, one large purchaser is allowed to audit only 300 of the nearly half a million claims its plan generates in a given year—and they are not able to extrapolate results. This means that if the plan found they overpaid by 5 percent on those 300 claims, they would have no recourse to address the likely overpayments on the other 99.9+ percent of claims. Even large plan sponsors have little leverage when negotiating with the large TPAs, who are some of the largest publicly traded companies in the country, and PBMs, where three PBMs process nearly 80 percent of prescriptions.[5]

Nor is this a minor problem that employers can disregard. If the evidence indicated that claims were overwhelmingly being paid correctly, perhaps auditing rights would not be as important an issue for purchasers to pursue, but with all available evidence pointing to errors being commonplace, it is simply not acceptable to continue blindly paying what the TPAs and PBMs bill. And it is also not acceptable for employers to shirk their fiduciary responsibility by foregoing the ability to audit their plans. At this point, we feel we have no choice but to ask the Legislature for help in ensuring that Maine employers and public purchasers have access to the information they need to ensure that their employee health plans are operating appropriately and in a cost-effective manner.

Addressing Stakeholder Concerns

You will likely hear from TPAs and PBMs today that they already conduct robust claim reviews on behalf of their clients. While we agree that these TPA/PBM reviews can help to identify and address some billing issues, they do not take the place of audits by independent auditors who conduct unbiased reviews of all aspects of an employer's plan, including TPA or PBM performance and compliance with contract terms. Audits need to be objective and robust, and that's difficult to achieve if an organization audits itself. In

[5] Federal Trade Commission, "FTC Releases Interim Staff Report on Prescription Drug Middlemen," July 9, 2024. Available at: https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-releases-interim-staff-report-prescription-drug-middlemen.

addition, many TPA and PBM agreements allow TPAs and PBMs to pocket a portion of the assets recovered by their own reviews—essentially, allowing the TPA or PBM to profit from their own mistakes.

They may also say that employers already have rights to conduct audits, and that this legislation is unnecessary. I can assure you that for our members, this is not the case. Many have tried to get audit restrictions removed from their contracts, and the vast majority have been unsuccessful. Further, if carriers and PBMs already make all necessary audit data available to employers without restriction, LD 1906 should not impose additional burdens on them.

TPAs and PBMs may also argue that they can't provide employers or their auditors with access to their own claims data because it's proprietary—with such proprietary information often including the amounts billed by providers and the amount paid by the TPA. But since federal statute and regulations now require providers and carriers to publish negotiated rates,[6] there's a strong argument to be made that these data are not proprietary. Moreover, all TPA and PBM agreements contain detailed confidentiality provisions that provide ample recourse to the TPA or PBM if their data were used or disclosed inappropriately. Finally, if allegedly proprietary data is disclosed on a small segment of claims, why can the information not be disclosed for all claims?

TPAs and PBMs may also claim that they are forced to include audit restrictions in their contracts with employers because that is what their contracts with providers stipulate, but federal law enacted in 2021 prohibits contract clauses that prevent the sharing of cost and quality data with plan sponsors and their business associates—such as auditors. Subsequent guidance jointly issued by three federal agencies clarifies that TPAs and PBMs cannot hide behind claims that such information is "proprietary" as a means of avoiding their obligations under federal law.[7] I would also note that the bill enacted in Indiana last year allowed carriers and PBMs to exclude proprietary data from their submissions, and just last week, Indiana's Governor signed into law legislation that eliminated that exemption for proprietary data.

A Note on Preemption

Some may express concern that LD 1906, if passed, would be preempted by ERISA, as it would prohibit carriers and PBMs from imposing audit restrictions on self-insured ERISA plans. Under current case law, however, we do not believe that ERISA would preempt LD 1906. Section 514(a) of ERISA states that ERISA

[6] Transparency in Coverage Final Regulations, 79 Fed. Reg. 72158-72310 (Nov. 12, 2020); 26 CFR §54.9815-2715A3; 29 CFR §2590.715-2715A3; 42 CFR §147.242.

[7] Department of Labor, Department of Health and Human Services, Department of the Treasury, and Office of Personnel Management, FAQs About Consolidated Appropriations Act, 2021 Implementation Part 57, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/affordable-care-act-and-caa-faqs-57.pdf.

pre-empts state laws insofar as those laws "relate to" any employee benefit plans covered by ERISA. The current interpretation of the statute by the U.S. Supreme Court holds that a state law "relates to" an ERISA plan if it has **a connection with** or **reference to** such a plan.[8]

As summarized in a US District Court case decided in March 2025,[9] a state law has a "connection with" an ERISA plan only when the law either requires a plan to structure its benefit plans in a particular way, or forces a plan to adopt a scheme of substantive coverage. LD 1906 does neither of these. It does not require a change in plan structure nor adoption of any scheme of substantive coverage. The requirements in LD 1906 apply to TPAs and PBMs, both entities that are licensed by the Bureau of Insurance for the State of Maine. Plan sponsors are free to take advantage of the broad audit rights and data that TPAs and PBMs would be required to make available to them, but they would not be required to do so. It would be completely their choice whether to conduct audits and it would not interfere with nationally uniform plan administration.

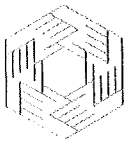
Nor do we believe "reference to" preemption applies to LD 1906. According to the U.S. Supreme Court, "reference to" preemption arises when a state's law acts immediately and exclusively upon ERISA plans, or where the existence of ERISA plans is essential to the law's operation. While LD 1906 would indeed prohibit TPAs and PBMs from imposing audit restrictions on ERISA plans, it would also prohibit them from imposing those restrictions on self-insured government plans, such as municipalities, the state employee plan, and the City of Portland, which are not ERISA plans. In HPA's book of business alone, those non-ERISA self-insured government plans represent nearly 57,000 Mainers. So, here again, the preemption standard does not apply. Simply put, the bill applies to TPAs and PBMs, whether or not they manage ERISA plans.

Finally, as mentioned earlier, Indiana enacted similar legislation last year, and, to date, no preemption challenge has been asserted against that statute, which I believe suggests those who might oppose that law do not think they have a strong preemption argument against the types of audit requirements now in place in Indiana and being proposed here in Maine.

In Conclusion

We believe that contract terms are usually best left to the parties to negotiate. But negotiations are only fruitful when the party making the request has alternative options. Since these auditing provisions are ubiquitous, and carriers and PBMs have by and large put their collective feet down, employers are left without any cards to play. We hope that the Legislature will agree that, in this instance, a statutory fix is

[8] Supreme Court of the United State. *Rutledge, Attorney General of Arkansas vs. Pharmaceutical Care Management Association,* December 10, 2020. Available at: https://www.supremecourt.gov/opinions/20pdf/18-540_m64o.pdf.
[9] United States Court of Appeals for the Sixth Circuit, *McKee Foods Corporation vs. BFP, Inc.,* March 31, 2025. Available at: https://www.eric.org/wp-content/uploads/2025/04/142-MEMORANDUM-OPINION-AND-ORDER.pdf.



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warranted to ensure that Maine employers can effectively monitor the billions of dollars they spend annually on healthcare coverage and reduce erroneous payments that come out of the pockets not just of Maine businesses, but also their employees and families.

Thank you for the opportunity to share with the committee how pervasive audit restrictions are affecting Maine employers and consumers. Healthcare affordability has reached the crisis stage in Maine and providing employers with the tools they need to ensure that they—and their employees—are not overpaying for care is an easy and impactful step that the Legislature can take to help address the high cost of care in our state. And thank you to Senator Bailey, for bringing this important bill before the Legislature. We're grateful for her support. I'd be happy to answer any questions and will be available for the work session.