
Tenth Circuit Holds ERISA Preempts Parts of Oklahoma Law Regulating PBMs

August 2023

On August 15, 2023, the U.S. Court of Appeals for the Tenth Circuit ruled in *Pharmaceutical Care Management Association v. Mulready, Insurance Commissioner of Oklahoma (PCMA v. Mulready)* that ERISA preempts various provisions of an Oklahoma law regulating employer-sponsored prescription drug plans. This decision permits ERISA-governed self-insured group health plans in the Tenth Circuit to administer a national system of plan administration and use pharmacy benefit manager (PBM) tools to potentially drive down costs.

This Aon bulletin discusses:

- Employer Group Health Plans and PBM Laws
- Which Provisions of the Oklahoma Law Are Preempted
- How Employers Are Impacted

Employer Group Health Plans and PBM Laws

More than half the states in the U.S. have passed laws regulating PBMs and pharmacy plan design after the U.S. Supreme Court in *Rutledge v. PCMA* upheld an Arkansas PBM-pharmacy reimbursement rate law against an ERISA preemption challenge.

Although ERISA allows employer-sponsored group health plans to disregard state laws that “relate to an employee benefit plan,” the courts have continued to define what types of state laws are preempted by ERISA. *PCMA v. Mulready* may slow the patchwork of state pharmacy laws that have disrupted employer plans implementing a national, uniform plan design.

PBMs perform a variety of intermediary functions on behalf of employer-sponsored prescription drug plans. PBMs contract with manufacturers to negotiate rebates on drugs, contract with health plans to manage the plans’ prescription drug benefits, and contract with pharmacies to design pharmacy networks. PBMs also offer various programs for health plans to design and structure their benefits and networks in an attempt to reduce costs for plans (e.g., preferred pharmacies or mail order).

At issue in *PCMA v. Mulready* was the Oklahoma statute known as the Patient’s Right to Pharmacy Choice Act that regulates PBMs that do business in that state. The Oklahoma legislature passed this law to bolster the bargaining power of independent pharmacies. The law contains multiple provisions that not only govern PBMs, but also affect how employer-sponsored group health plans function within the borders of Oklahoma.

Which Provisions of the Oklahoma Law Are Preempted

The Supreme Court in *Rutledge* held that ERISA does not preempt state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme

of substantive coverage. *Rutledge* identified two categories of state laws that have an impermissible connection with ERISA plans and are preempted: (1) laws that require providers to structure benefit plans in particular ways and (2) laws whose acute economic effects force an ERISA plan to adopt a certain scheme of substantive coverage.

The Tenth Circuit condensed this into an inquiry as to whether the state law governs a central matter of plan administration or interferes with nationally uniform plan administration. The Tenth Circuit rejected Oklahoma's argument that its PBM law escaped preemption by regulating PBMs and not group health plans, ruling that state laws can relate to ERISA plans even if they only regulate third parties.

Accordingly, the Tenth Circuit concluded that ERISA preempted the following provisions of Oklahoma's PBM law:

- **Network Access Standards.** This provision established geographical distances in which participating network pharmacies must be accessible to participants and did not allow mail-order pharmacies to be used to meet these access standards;
- **Discount Prohibition.** This provision barred PBMs from promoting in-network pharmacies to participants by offering cost-sharing discounts, such as reduced copayments;
- **Any Willing Provider/Pharmacy (AWP) Provision.** Under this provision, PBMs were not allowed to deny a provider the opportunity to participate in a pharmacy network if that provider was willing to accept the terms and conditions of participation that the PBM had established for other providers for network participation; and
- **Probation Prohibition.** Under this provision, PBMs could not deny, limit, or terminate a provider's contract based on employment status of any employee who had an active license to dispense, even if a staff pharmacist was on probation status with the Oklahoma State Board of Pharmacy.

The Tenth Circuit also held that Medicare Part D preempted the AWP Provision as applied to Part D plans. The Tenth Circuit held that this provision established a rule that governs pharmacy networks for Part D plans, where state laws are only permitted to survive Part D preemption for licensing laws or laws relating to plan solvency.

How Employers Are Impacted

While this ruling only affects the Oklahoma PBM law, the case sets a precedent within the Tenth Circuit, which covers Oklahoma, Kansas, New Mexico, Colorado, Wyoming, Utah, and portions of Yellowstone National Park extending into Montana and Idaho. This opinion gives a boost to ERISA preemption, which up to this point appeared to be eroding in court. This opinion may slow the onslaught of other state PBM laws that are showing up in multiple states across the country and provide support to advocates of ERISA in other jurisdictions. The impact of the variety of state PBM laws outside of Oklahoma remains an open question until and unless the U.S. Supreme Court reviews the *Mulready* decision.

Resources

A copy of the opinion can be found [here](#).



About Aon:

[Aon plc](#) (NYSE: AON) exists to shape decisions for the better — to protect and enrich the lives of people around the world. Our colleagues provide our clients in over 120 countries and sovereignties with advice and solutions that give them the clarity and confidence to make better decisions to protect and grow their business.

Follow Aon on [LinkedIn](#), [Twitter](#), [Facebook](#) and [Instagram](#). Stay up-to-date by visiting the [Aon Newsroom](#) and sign up for News Alerts [here](#).