



State & Local Compliance Update

USI EMPLOYEE BENEFITS

October 11, 2023

Oklahoma PBM Law Preempted by ERISA

The 10th Circuit Court of Appeals ruled in favor of ERISA preemption in *Pharmaceutical Care Management Association (“PCMA”) v. Mulready*, finding that Oklahoma’s Patient’s Right to Pharmacy Choice Act (“the Act”) regulating pharmacy benefit managers (“PBMs”) is preempted by ERISA.¹ This decision reversed the lower court’s finding that the Act was not preempted.²

Briefly, the court considered the Act’s following requirements in its analysis of ERISA preemption:

- Network Restrictions:
 - Access Standards. A PBM must comply with network access standards and may not use mail-order pharmacies to meet these standards.
 - Discount Prohibition. An individual's choice of in-network provider may include a retail pharmacy or a mail-order pharmacy. A PBM may not restrict such choice and may not require or incentivize using any discounts in cost-sharing or a reduction in copay or the number of copays to individuals to receive prescription drugs from an individual's choice of in-network pharmacy.
 - AWP Prohibition. A PBM cannot deny a provider the opportunity to participate in any pharmacy network at preferred participation status if the provider is willing to accept the terms and conditions that the PBM has established for other providers as a condition of preferred network participation status.
- Probation Prohibition. A PBM may not deny, limit, or terminate a provider's contract based on employment status of any employee who has an active license to dispense, despite probation status, with the State Board of Pharmacy.

In finding in favor of ERISA preemption, the court held that:

- The network restrictions effectively abolish the two-tiered network structure, eliminate any reason for plans to employ mail-order or specialty pharmacies, and oblige PBMs to embrace

¹ The court also held the law was preempted by Medicare Part D in that state law attempted to regulate Part D plans. A discussion of the Part D preemption issues is beyond the scope of this article.

² See USI’s Compliance Update, [Status of Oklahoma’s Patient’s Right to Pharmacy Choice Act](#) (June 23, 2023).

every pharmacy into the network. These limits are state law mandated benefit structures which are not permitted under ERISA.

- The probation prohibition acts like a network restriction, dictating which pharmacies must be included in a plan's PBM network. An ERISA plan that chooses to hire a PBM is limited by state statute to using PBM networks of a certain structure – one that would include a pharmacist on probation. Such a state restriction is also preempted by ERISA.

The court distinguished its ruling from the U.S. Supreme Court's decision finding an Arkansas PBM law was not preempted by ERISA as the law regulated cost (reimbursement-rate regulation). The court found that the Oklahoma law goes further than Arkansas's PBM law in it regulates aspects of plan administration and design and therefore has an impermissible connection with ERISA plans.

“Unlike Arkansas's reimbursement-rate regulations, Oklahoma's network restrictions do more than increase costs. They home in on PBM pharmacy networks—the structures through which plan beneficiaries access their drug benefits. And they impede PBMs from offering plans some of the most fundamental network designs, such as preferred pharmacies, mail-order pharmacies, and specialty pharmacies. In sum, PCMA is not resisting the Act's imposing higher costs, but Oklahoma's attempting to “govern[] a central matter of plan administration” and “interfere[] with nationally uniform plan administration.”

Mulready, the insurance commissioner of Oklahoma, has already expressed his intent to appeal the 10th Circuit ruling and indicates that enforcement of the Act will continue to the maximum ability of state law.³ Most likely the Supreme Court will be asked to weigh in on this issue.

EMPLOYER NEXT STEPS

For now, employers should carefully monitor developments in the state PBM space. Federal courts may take a closer look at the state PBM laws for areas of overreach consistent with the 10th Circuit ruling. Ultimately, the U.S. Supreme Court may be asked to weigh in again on the intersect between state PBM regulations and ERISA preemption.

RESOURCES

For a copy of the 10th Circuit decision, visit

<https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110903570.pdf>

USI [usi.com/locations](https://www.usi.com/locations)

This summary is intended to convey general information and is not an exhaustive analysis. This information is subject to change as guidance develops. USI does not provide legal or tax advice. For advice specific to your situation, please consult an attorney or other professional.

These materials are produced by USI Insurance Services for educational purposes only. Certain information contained in these materials is considered proprietary information created by USI. Such information shall not be used in any way, directly or indirectly, detrimental to USI and/or their affiliates.

Neither USI nor any of its respective representatives or advisors has made or makes any representation or warranty, expressed or implied, as to the accuracy or completeness of these materials. Neither USI nor their respective representatives or advisors shall have any liability resulting from the use of these materials or any errors or omission therein. These materials provide general information for the use of our clients, potential clients, or that of our clients' legal and tax advisors.

IRS Circular 230 Disclosure: USI Insurance Services and its affiliates do not provide tax advice. Accordingly, any discussion of U.S. tax matters contained herein (including any attachments) is not intended or written to be used, and cannot be used, in connection with the promotion, marketing or recommendation by anyone unaffiliated with USI of any of the matters addressed herein or for the purpose of avoiding U.S. tax-related penalties.

© 2023 USI Insurance Services. All Rights Reserved.

³ https://www.oid.ok.gov/release_082123/