

ERISA Preemption: Navigating the Federal-State Legal Maze

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Speakers



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ERISA Preemption

ERISA Preemption under Threat

- ◉ In the last several years, many states have pursued, and enacted, legislation that undermines ERISA preemption
 - ◉ Began with laws aimed at pharmacy benefit managers (PBMs) but has expanded beyond PBMs
 - ◉ State regulatory efforts as well
 - ◉ “Red” and “blue” issue
- ◉ Litigation in the federal courts in response
 - ◉ As part of litigation, the U.S. Department of Labor (DOL) has also weighed in with its perspective
- ◉ Under consideration in Congress as well
- ◉ This is all happening in the context of ERISA’s 50th Anniversary



Important Judicial Developments

- ◉ *PCMA v. Rutledge*, U.S. Supreme Court (2020)
 - ◉ PCMA challenged an Arkansas law that required PBMs to pay pharmacies a minimum amount and to have standards for disputes with pharmacies
 - ◉ Supreme Court (in a unanimous decision) held the law was not preempted by ERISA – it was a rate regulation with an indirect impact on ERISA plans
- ◉ *PCMA v. Mulready*, 10th Circuit (2023)
 - ◉ PCMA challenged an Oklahoma law limiting the ability for plans to have differential cost-share for in-network pharmacies and prohibited mail-order only pharmacy benefits
 - ◉ Appeals court found the law to be preempted by ERISA; Mulready has until May 10th to appeal to the Supreme Court



Department of Labor Perspective

- ◉ Appeals court asked DOL to provide its view in *Mulready*
- ◉ DOL (via the Department of Justice) argued that many of the provisions in the OK law had an impermissible connection with ERISA plans such that preemption would apply
- ◉ However, DOL went on to say that the challenged provisions should be saved from preemption by ERISA under ERISA's "Savings Clause", which protects states' historical regulatory authority over insurers and insurance policies
- ◉ DOL also argued that ERISA's "Deemer Clause" would only ensure preemption if the state law applied directly to the self-insured ERISA plan, as opposed to its service providers, like PBMs
 - ◉ The Deemer Clause historically permits self-insured plans to design their plans without regard to state law even if they utilize third-party entities to administer their plans because it forbids states from "deeming" self-insured plans to be engaged in the business of insurance



State Activity – Past & Present

- ◉ **Categories of Activity**
 - ◉ PBM
 - ◉ Prior Authorization
 - ◉ All-Payer Claims Databases
 - ◉ Specialty Pharmacy – “White Bagging”
- ◉ **2023 legislative session -- 32 proposals in 21 states**
 - ◉ **Eight bills (in six states) became law**
 - ◉ PBM related – South Dakota, Arkansas, Florida, New Jersey
 - ◉ Prior authorization – Arkansas, Louisiana (2 new laws)
 - ◉ All Payer Claims Database - Indiana



State Activity – Past & Present

- ◉ 2024 State Activity ... So Far
 - ◉ High volume of bills
 - ◉ Review categories and top actions
- ◉ Watching PBM implementation activity: FL, NJ, TN and beyond
- ◉ State-based organizations are active as well
 - ◉ National Council of Insurance Legislators (NCOIL)
 - ◉ Resolution adopted at recent meeting; efforts to support ERISA preemption waivers
 - ◉ National Association of Insurance Commissioners (NAIC)
 - ◉ White Paper on PBM activity, including self-insured plans and ERISA

Federal Legislative Activity

- ◉ **House Education and Workforce Committee Request for Information (RFI) on ERISA:**
 - ◉ “ERISA’s federal preemption of state insurance laws permits employers to design benefit plans tailored to the needs of employees and their families, and it is viewed by many employers as essential to their sponsorship of health and retirement benefits”
 - ◉ Seeks feedback on ways to strengthen and clarify ERISA preemption; state laws threatening preemption; action Committee should take to provide more clarity and strengthen ERISA preemption
 - ◉ April 16th Subcommittee hearing on ERISA’s 50th anniversary
- ◉ **Efforts to erode ERISA preemption in federal legislation?**





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ERISA – Fiduciary Status

Current Law

- ◉ Robust fiduciary duties of prudence and loyalty
- ◉ Extensive liability and enforcement regime, which includes personal liability of fiduciaries, as well as co-fiduciary liability
- ◉ A person is a fiduciary to a plan to the extent that person
 - ◉ Has any authority or control over the management of plan assets
 - ◉ Has discretionary authority over plan administration, OR
 - ◉ Renders investment advice to the plan for a fee
- ◉ Named fiduciaries
 - ◉ ERISA also requires that every plan have a “named fiduciary,” which means that certain fiduciaries must be identified in the plan document

Current Law

- ◉ The definition of fiduciary is *functional*
 - ◉ An individual or entity can be a fiduciary regardless of whether they are identified as a fiduciary in any document or whether they accept fiduciary status
 - ◉ Their conduct determines whether they are a fiduciary
- ◉ Typical Plan Fiduciaries
 - ◉ Plan administrator
 - ◉ Administrative and investment committees
 - ◉ Claims decision-makers
 - ◉ Anyone who exercises discretion over plan administration or investments



Current Law

- ◉ Determining when/whether a service provider is acting as a fiduciary is complex and highly fact specific; based on evolving case law
- ◉ For example, fiduciary status might attach to a service provider if the service provider
 - ◉ Is the final decision maker on claims and appeals
 - ◉ Has discretion over spending plan assets
 - ◉ Has discretion over the amount of benefit provided (such as OON reimbursement rate)
 - ◉ Has discretion over the item or service to be covered
 - ◉ Has discretion over amount or cost-sharing that is applied or the participant's OOP expense



Possible Expansion of Current Definition

- ⦿ **House Education and Workforce RFI seeks feedback on:**
 - ⦿ **Fiduciary definition and obligations regarding health plans**
 - ⦿ **How can Congress clarify the extent to which fiduciary responsibilities are applied to insurance companies, insurance agents, broker-dealers, third party administrators (TPAs), PBMs, or other service providers?**
- ⦿ **Considerations to take into account**

On the Web:



<http://www.americanbenefitscouncil.org>



<http://www.twitter.com/benefitscouncil>
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Speakers



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Meetings and Events

An Employer Case Study: Road to Value Through Health

June 20, 2024 – 12:00 p.m. – 12:30 p.m.

Registration opening soon!

Fiduciary Check In

May 16, 2024 - 12:00 p.m. – 12:30 p.m.

Registration opening soon!

Coalition Strategy Summit

June 10 – 11, 2024

University Club, Chicago, IL

Open to all employers

Contact Karlene Lucas or your local coalition for details

2024 Annual Forum

November 18 – 20

Crystal Gateway Marriott, Arlington, VA

Registration opening soon!

Annual Forum call for speakers now open!

Deadline to apply is May 3

Contact Karlene Lucas with questions

<https://nationalalliancehealth.swoogo.com/2024annualforum/Callforspeakers>

