

Limiting ERISA Pre-emption

Implications for Employer-Sponsored Benefit Plans



COMMENTARY

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Private sector self-funded employer health plans could face increased cost and state regulation, pending the ruling of a case argued last week before the Supreme Court of the United States. In *Rutledge vs. Pharmaceutical Care Management Association (PCMA)*, justices will decide whether the Employee Retirement Income Security Act of 1974 (ERISA), as amended, pre-empts state laws that apply to pharmacy benefit managers (PBMs), but that, in actuality, regulate private sector self-funded employer health plans (“self-funded ERISA plans”).¹

At issue in the case is Act 900, an Arkansas law passed in 2015 and subsequently challenged in federal court to determine its applicability to self-funded ERISA plans.

Among other provisions, the legislation:

- Requires PBMs to reimburse pharmacies at or above their drug acquisition costs.
- Allows pharmacies to decline to dispense a drug at the time of sale if they would lose money on the transaction.

If ERISA pre-emption is not upheld for self-funded ERISA plans using PBMs to administer prescription drug benefits, we believe the implications may be far-reaching by:

- Threatening the ability of self-funded ERISA plans to design and administer consistent, affordable and high-quality health benefit programs for employees and their families.
- Significantly undermining employer and third-party administrator-led innovations that help improve quality and lower costs of care for self-funded ERISA plans.
- Causing health care costs for employees and their families to rise due to higher drug costs, greater administrative burden and the need to devote resources to comply with varied state regulatory requirements.

“More than 266 million Americans rely on the prescription drug benefits PBMs administer, and now more than ever we’re committed to protecting accessible, affordable health care. Today showed, yet again, the strength of our arguments and the importance of federal pre-emption to ensure employers are able to provide the best possible drug benefits for employees, no matter where they live and work.”²

*J.C. Scott, President and CEO, PCMA,
in a statement following oral arguments at the Supreme Court*

What is ERISA and ERISA Pre-emption?

ERISA is a federal law that regulates employer-sponsored benefit plans of private employers. ERISA protects employees by ensuring they receive the value of the benefits provided under employer plans. Congress intentionally included broad federal pre-emption in ERISA to allow for uniform plan administration across the nation. ERISA’s pre-emption provisions allow plan sponsors to seek lower-cost nationwide pricing for health care services, allowing for uniformity of benefit design and equity across their workforce.

Why Does ERISA Pre-emption Matter?

The pre-emption provision in ERISA allows employers to provide consistent, equitable, and affordable health care benefits to all their employees and their families — regardless of where they live or work. With limited pre-emption, self-funded ERISA plans would find operating under a variety of cumbersome and potentially conflicting state-based rules to be challenging and expensive.

Specifically, limiting pre-emption could take away the ability of self-funded ERISA plans to implement cost-saving strategies such as:

- Innovative network design strategies such as tailored networks, closed networks, centers of excellence and accountable care organizations, etc.
- Value-based payments and pay-for-performance arrangements with providers.
- Reference-based pricing for out-of-network providers.
- Incentives to drive plan members to various networks.

What's Next?

While we don't know when the Supreme Court will issue a ruling, we believe the decision could be published as early as December. The court has the option to rehear the case once a new justice is appointed, a decision that could delay the ruling. The verdict will have important legal and practical implications for ERISA plans, multi-state employers and the employees they cover.

A ruling for PCMA would potentially build upon and extend the court's favorable ERISA pre-emption precedents. By contrast, a ruling for Arkansas could significantly threaten ERISA pre-emption, inviting additional attempts by states to regulate self-funded ERISA plans in service of local interests, just as we believe Arkansas did here. Such laws are often variable and contradictory, creating unsustainable complexity and cost burdens for employers.



Whatever the outcome, all of us at CVS Health stand ready to help our clients comply with all applicable state and federal regulations. We remain committed to working to ensure members have affordable access to the medications they need.

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1. <https://www.supremecourt.gov/docket/docketfiles/html/public/18-540.html>.
2. <https://www.pcmnet.org/pcma-defends-access-to-affordable-high-quality-health-plans-for-american-job-creators-employees-and-patients-at-supreme-court/>.

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