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# COMPLIANCE ALERT

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EMPLOYEE BENEFITS | SEPTEMBER 6, 2023

## Tenth Circuit Court of Appeals Hands Down a Big Win for ERISA Preemption

After several failed attempts by pharmacy benefit managers (“PBM”) to challenge state laws regulating PBMs, the 10th Circuit Court of Appeals (in *Pharmaceutical Care Management Association v. Mulready*) handed down a big win for PBMs and, by extension, self-funded ERISA plans, when it held that provisions under an Oklahoma insurance law that established strict network adequacy standards and over-broad “any willing provider” requirements for PBMs were preempted by ERISA. Certain provisions of the law were also successfully challenged as being preempted by Medicare Part D; however, the scope of this alert is limited to the portions of the 10th Circuit’s opinion related to ERISA preemption.

The Oklahoma PBM law at issue in the case, (1) sets forth stringent geographic parameters for making brick and mortar pharmacies available to plan participants, (2) limits the use of mail order pharmacies as a replacement for brick and mortar pharmacies, (3) bars PBMs from promoting in-network pharmacies by offering financial incentives such as copay or cost sharing reductions, (4) requires PBMs to admit any provider willing to accept the PBM’s preferred network terms and conditions, and (5) prohibits PBMs from refusing to allow pharmacies with pharmacists on probation with the state regulatory agency from being in the PBMs’ network.

When challenged at the district court level, the lower court determined that none of these provisions impacted plan design or choices for plan administrators and upheld the law. However, on appeal, the 10th Circuit wholeheartedly disagreed, finding that these restrictions, among other things, infringe upon central matters of plan administration. The court

recognized that the Oklahoma PBM law network restrictions, “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.” Further, the court recognized that restricting PBMs from denying, limiting, or terminating a plan’s pharmacy contract because of licensure issues (i.e., allowing them to limit the network when a pharmacy has a pharmacist who is on probation with the state licensure agency) essentially forces the PBM to consider all pharmacies over any safety concerns the plan may choose to impose.

Thus, while the Oklahoma law does not directly regulate ERISA plans, but rather PBMs, the court recognized that ERISA plans are virtually compelled to use PBMs to administer their prescription drug benefits and, therefore, held that the Oklahoma law is preempted by ERISA as it impermissibly impacts and/or relates to ERISA plans by interfering with plan administrators’ ability to administer their plans uniformly.

### Conclusion

PBMs have been a target of state regulation for some time, and we don’t anticipate that this decision will discourage them further, particularly in states outside the purview of the 10<sup>th</sup> Circuit. In the meantime, it’s possible the case could ultimately be appealed to the U.S. Supreme Court. We will continue to monitor state PBM laws and the progress of this case.

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