COMPLIANCE ALERT

Court Rules Tennessee PBM Law Is Preempted by ERISA

May 1, 2025

Quick Facts

- The Employee Retirement Income Security Act (ERISA) has an express preemption provision, which says that a state law that "relates to" an ERISA plan is preempted by federal law.
- In May 2021, Tennessee passed an amendment to a provision of its pharmacy benefit manager (PBM) law, extending the "any willing provider" law to specifically include self-funded ERISA plans.
- McKee Foods Corporation (McKee) filed an action against the Tennessee Insurance Commissioner, stating that the Tennessee law is preempted by ERISA.
- The U.S. District Court for the Eastern District of Tennessee recently ruled in favor of McKee, stating that ERISA preempted the Tennessee statute because they have an impermissible "connection with" ERISA plans.

Background

McKee Foods Corporation (McKee) is a commercial bakery in Tennessee that offers a self-funded health plan governed by the Employee Retirement Income Security Act (ERISA). The McKee prescription drug plan provides more favorable prescription drug benefits to plan participants who use an in-network pharmacy. Thrifty Med Plus Pharmacy (Thrifty Med) is an independent pharmacy in Tennessee. Thrifty Med was part of the McKee prescription drug network until 2019, when it was removed from the network by McKee and its pharmacy benefit manager (PBM). Effective July 2021, Tennessee amended its PBM law to extend its "any willing provider" (AWP) requirement to self-funded entities

The Tennessee Department of Commerce and Insurance took enforcement action against McKee and its health plan for dropping Thrifty from its pharmacy network in 2021. In response, McKee filed an action against Thrifty Med stating that legislation requiring health plans to accept any willing pharmacy into their network was a violation of ERISA preemption. Prior to the 2021 amendment, the law applied only to fully insured entities governed by Tennessee insurance law.

On March 31, 2025, the U.S. District Court for the Eastern District of Tennessee ruled in the case ***McKee Foods Corp. v. BFP Inc. d/b/a/ Thrifty Med Plus Pharmacy***, granting summary judgment to Plaintiff McKee, and declaring certain pharmacy network adequacy provisions, specifically AWP provisions of the challenged Tennessee PBM law, are preempted by ERISA as applied to self-funded health plans.

ERISA Preemption

The "Supremacy Clause" of the U.S. Constitution allows federal laws to preempt state laws. ERISA is one such law. ERISA has an express preemption provision, which says that a state law that "relates to" an ERISA plan is preempted by federal law. There is an exception for state laws that regulate insurance, banking, or securities, as provided for under the "Saving Clause" that allows insurers to be regulated by state law. Under the Saving Clause, states may regulate the insurers that provide services to an insurance plan, but not an employee benefit plan itself. The intent of ERISA preemption for employee benefit plans is to keep plan uniformity across the country.

Courts use a test to determine whether a state law "relates to" an ERISA plan. As provided in §514, ERISA "shall supersede any and all State laws insofar as they may now and hereafter relate to any employee benefit plan." A state law "relates to" ERISA if it has a connection with or reference to the plan. State laws need not directly impact an ERISA plan to be preempted, but the more impact the law has on the central matter of plan design and administration, the more likely it is to interfere with national plan uniformity and, therefore, the more likely it is to be preempted. Laws that have an incidental impact on a plan are less likely to be preempted. Access our prior Compliance Insights article on *Rutledge* and ERISA preemption from **September 2022**.

Supreme Court Ruling *Rutledge v. PCMA*

In December 2020, the Supreme Court of the United States (SCOTUS), in a unanimous decision, held in the case *Rutledge v. PCMA,* (*Rutledge),* that an Arkansas law that regulates the relationship between PBMs and pharmacies was not preempted by ERISA. The law requires PBMs to reimburse pharmacies at a rate that, at the minimum, reimburses what the pharmacy paid for the drug from a wholesaler. While the lower courts in *Rutledge* found in favor of PCMA, ruling that the law was preempted by ERISA, SCOTUS concluded that the law was not preempted by ERISA for two reasons:

- First, because there is no impermissible connection to ERISA. According to SCOTUS, the law is a form of cost regulation, and while the law may increase ERISA plan costs, it does not force plans to adopt any particular type of coverage, and the cost increase would not impact plan choices.
- Second, SCOTUS held that the law does not "relate to" an ERISA plan because the law governs PBMs generally, whether or not they manage ERISA plans.

Potential Impact on PBM Regulation

Since the 2020 *Rutledge* ruling*,* hundreds of PBM bills have been introduced across all states. The laws are all different and aim to regulate the PBM industry in various ways. The differences make applying case law in Rutledge and other precedent cases difficult and make predicting outcomes of these cases nearly impossible. Because of the outcome in *Rutledge*, it is likely that more states will implement laws regulating PBMs because although the substance of the laws may differ, states may try to rely on precedent ruling by stating that the laws have minimal impact on ERISA plan administration and that although there may be a cost impact, that impact does not relate ERISA plan design or uniformity.

McKee Foods v. Thrifty Med

The Tennessee PBM statute states:

"A pharmacy benefits manager or a covered entity shall not: (1) Interfere with the right of a patient, participant, or beneficiary to choose a contracted pharmacy or contracted provider of choice in a

manner that violates § 56-7-2359 [Tennessee's 'any willing provider' law]; or (2) Offer financial or other incentives to a patient, participant, or beneficiary to persuade the patient, participant, or beneficiary to utilize a pharmacy owned by or financially beneficial to the pharmacy benefits manager or covered entity."

Tennessee Code § 56-7-3102(1) expressly includes ERISA plans in the statutory definition of covered entity and pharmacy benefit manager.

The court ruled in favor of McKee and found that the challenged provisions were preempted by ERISA. The court applied precedent case law outlined in the decisions *Rutledge, Pharm. Care Mgmt. Association v. Mulready (Mulready), Gobeille v. Liberty Mut. Ins. Co,* and *Kentucky Association of Health Plans, Inc. v. Nichols* in its decision holding that ERISA preempted the Tennessee statute because they have an impermissible "connection with" ERISA plans. The court states:

"Any-willing-provider requirements eliminate this choice, forcing ERISA plans to accept, as the name suggests, any willing provider. In doing so, these provisions 'require providers to structure benefit plans in [a] particular way[],' eliminating the plans' discretion to shape benefits as they see fit…This direct regulation of benefit structure distinguishes any-willing-provider laws from the law at issue in Rutledge. Consequently, the Court finds that Rutledge did not abrogate Nichols, and this Court remains bound by Nichols's holding…Therefore, the any-willing-provider requirements in the challenged laws—Tenn. Code Ann. §§ 56-7-2359, 3120(b)(1), 3121(a)–(b)—are preempted by ERISA to the extent they attempt to govern ERISA plans."

This decision aligns with PCMA's defense of the Tenth Circuit's holding in *Mulready,* that similar Oklahoma PBM "any willing provider provisions" were ERISA preempted. *Mulready* is currently pending before the Supreme Court. Access our prior alerts on *Mulready* issued in **September 2023**, **August 2024**, and **November 2024** for more information.

Summary

The court decision in this case aligns with the Tenth Circuit's holding in *Mulready*. This ruling is a win for self-funded group health plans that prefer the simplicity of following a uniform set of requirements. However, at this time, it remains unclear whether the Tennessee Insurance Commissioner will appeal. EPIC will continue to monitor developments with this case and other PBM law preemption decisions and provide updates as they become available.

EPIC Employee Benefits Compliance Services

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