

Tenth Circuit Holds that ERISA and Medicare Part D Preempt Oklahoma PBM Law



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On August 15, 2023, the Tenth Circuit Court of Appeals handed down its opinion in *Pharmaceutical Care Management Association v. Mulready* (*Mulready*) holding that the Employee Retirement Income Security Act of 1974 (ERISA) and Medicare Part D preempted certain provisions of Oklahoma’s Patient’s Right to Pharmacy Choice Act (the Act). The full opinion can be found [here](#).

The Act, passed in 2019, sought to regulate pharmacy benefit managers (PBMs) and set out to “establish minimum and uniform access to a provider and standards and prohibitions on restrictions of a patient’s right to choose a pharmacy provider.” The Pharmaceutical Care Management Association (PCMA) sued to invalidate the Act, alleging that ERISA and Medicare Part D preempted the Act. The United States District Court for the Western District of Oklahoma ruled that ERISA did not preempt the Act. PCMA appealed the district court’s ERISA ruling on four provisions of the Act and a Medicare Part D ruling on one provision of the Act.

The four provisions of the Act identified by PCMA and discussed by the Court dealt with retail pharmacy network access standards, discount prohibition, any willing provider provision and prohibition on limitations of probation based pharmacy providers. *Mulready* held that each of these provisions were preempted by ERISA. Additionally, *Mulready* held that Medicare Part D preempts the any willing provider provisions of the Act as applied to Part D plans.

Relying heavily on opinions from the Fifth Circuit and Sixth Circuit, the Court held that the access standards, discount prohibition and any willing provider provision were preempted by ERISA due to the fact that they were network restrictions that mandated benefit structures prohibited by ERISA.¹ The Court stated that based on the Act, “all PBMs could offer Oklahoma ERISA plans is a single-tiered network with uniform copayments, unrestricted specialty-drug access, and complete patient freedom to choose a brick-and-mortar pharmacy. These network restrictions are quintessential state laws that mandate benefit structures. ERISA forbids this.”

With regard to the probation provision, the Court stated that it barred “PBMs from denying, limiting, or terminating a pharmacy’s contract because one of its pharmacists is on probation with the Oklahoma State Board of Pharmacy.” The Court relied again on reasoning from the Fifth and Sixth Circuit opining that “ERISA plans that choose to [hire a PBM] are limited by the statute to using [PBM networks] of a certain structure—i.e., a structure that includes [pharmacists on probation].’ So the Probation Prohibition is also preempted.”

Finally, the Court opined that Medicare Part D preempts the any willing provider provision of the Act as it is applied to Medicare Part D plans. The Court notes that Medicare Part D has a broad preemption clause

taken from Medicare Part C stating that it “provides that ‘[t]he standards established under [Part D] shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to [prescription-drug plans] which are offered by [prescription-drug-plan sponsors] under [Part D].’”^[2] The Court held that “the [Medicare] Part D regulations—which govern universal access only to plans' standard networks and which give plans discretion to select preferred providers within their networks—overlap with Oklahoma's [any willing provider] Provision and thus would preempt it.”

In conclusion, the Court states that “[t]hough the Act avoids mentioning ERISA plans or Medicare Part D plans by name, it encompasses these plans by striking at the heart of network and benefit design.” *Mulready* highlights the ongoing litigation across the United States dealing with state regulation of pharmacy benefit managers.

^[1] See *CIGNA Healthplan of La., Inc. v. Louisiana ex rel. Ieyoub*, 82 F.3d 642 (5th Cir. 1996); *Ky. Ass'n of Health Plans v. Nichols*, 227 F.3d 352 (6th Cir. 2000).

^[2] See 42 U.S.C. § 1395w-26(b)(3)