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ERISA Preemption of North Dakota House Bill 1584

ERISA preempts any state law that "relates to" an ERISA-covered employee benefit plan. ERISA § 514(a). As recognized by the Supreme Court of the United States, a central purpose of ERISA's broad preemption provision is to allow for the uniform administration of ERISA plans. *See, e.g., Egelhoff v. Egelhoff*, 432 U.S. 141, 148 (2001) (holding that ERISA preempted a state statute governing beneficiaries under an ERISA plan). A state law "relates to" a plan, and implicates preemption, when it has a "connection with or reference to" an ERISA plan. *Id*. at 147. The Supreme Court has made clear that a central purpose of ERISA's broad preemption provision is to allow for the uniform administration of ERISA plans. *See, e.g., Egelhoff v. Egelhoff*, 432 U.S. 141, 148 (2001) (holding that ERISA preempted a state statute governing beneficiaries under an ERISA plan).

The Supreme Court clarified two main categories of state law that ERISA would preempt: (1) "where a state's law acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation" and (2) where there is "an impermissible connection with ERISA plans [which] govern a central matter of plan administration." *Gobeille v. Liberty Mut. Ins. Co*., 577 U.S. 312, 319-320 (2016) (internal quotations and citations omitted). Notably, the state law at issue in *Gobeille* applied to the third-party administrator ("TPA") acting on behalf of the ERISA-covered plan. In recognition of the statutory "deemer clause," which prevents states from "deeming" a self-insured, ERISA-covered plan to be an insurer for purposes of the insurance savings clause, the Court held that the Vermont law at issue was preempted, notwithstanding the fact that it applied to the insurer acting as a TPA for the plan. ERISA § 514(b)(2). A state law may also be preempted if its economic effects force an ERISA plan to adopt certain coverage or restrict its choice of insurers. *See id*. at 320.

In *Rutledge*, the most recent Supreme Court case analyzing ERISA preemption, the Court affirmed both *Egelhoff* and *Gobeille* when reviewing a state law that regulates the reimbursement amounts PBMs pay pharmacies for drugs covered by prescription drug plans. *Rutledge v. Pharm. Care Mgt. Assn.*, 592 U.S. 80, 86 (2020). In a narrowly tailored decision, the Court held that the state law was not preempted by ERISA because it merely regulated costs rather than dictate ERISA-plan choices. *See id.* at 81. Instead, the Court focused squarely on the facts of the Arkansas cost-regulation while applying earlier Court precedent addressing the extent to which state-level cost regulation is preempted. Importantly, the Court was clear that prior precedent outside the context of indirect cost regulation remained intact and found that the state law did not govern a "central matter of plan administration" by increasing costs for ERISA plans without forcing plans to adopt certain rules for coverage. *Id* at 80; *Gobeille* at 320. Moreover, the Court in *Rutledge* also reaffirmed the long-held view of the Court that a state law "which requires employers to pay employees specific benefits, clearly 'relate to' benefit plans," and are thus subject to preemption. *Shaw v. Delta Air Lines, Inc*., 463 U.S. 85, 97 (1983); *Rutledge*, 592 U.S. at 86-87.

More recently, the Tenth Circuit properly read *Rutledge* as being limited to indirect cost regulation. In *Mulready* the court examined an Oklahoma state law that imposed regulations on PBMs and pharmacy networks in an effort to establish minimum and uniform guidelines regarding a patient's right to choose a pharmacy provider. *PCMA. v. Mulready*, 78 F.4th 1183, 1190 (10th Cir. 2023). The state law included four key provisions that subjected PBMs to certain rules including pharmacy access network standards and restrictions on the incentives given to individuals who fill prescriptions at in-network pharmacies. *See id.* at 1190-1191. The court held that all four provisions were preempted by ERISA because they had an impermissible connection with ERISA plans by mandating certain benefit structures related to a key benefit design (*i.e.* the scope and differentiation of the plan's pharmacy network benefit). *Id.* at 1199-1200. The court found that the Oklahoma law was an attempt by the State to "govern[ ] a central matter of plan administration" and "interfere[ ] with nationally uniform plan administration." *Id.* at 1200.[1]

The *Mulready* decision contrasts directly with the view taken by the Eighth Circuit in *Pharm. Care Mgmt. Ass'n v. Wehbi*, where that court evaluated whether ERISA preempted a North Dakota statute prohibiting PBMs from precluding pharmacies in probationary status from their pharmacy networks. *Pharm. Care Mgmt. Ass'n v. Wehbi*, 18 F.4th 956 (8th Cir. 2021). The *Wehbi* court found that such provisions were not preempted by ERISA because the state law merely regulated a "noncentral 'matter of plan administration' with de minimis economic effects" and otherwise did not "'requir[e] payment of specific benefits' or 'bind[ ] plan administrators to specific rules for determining beneficiary status.'" *Id.* at 968 (citations omitted). However, the *Mulready* court has since appropriately explained how this "formulaic" explanation fails to appropriately apply longstanding ERISA preemption standards, which instead require a court to "assess [a state's] law's effects on the structure of the provider network and connected effect on plan design." *Mulready*, 78 F.4th at 1203. The end result is that while *Wehbi* may for the time being remain the controlling law in the Eighth Circuit, the law is anything but settled, as the precise questions presented in *Mulready* and *Wehbi* (regarding network admission) are currently before the United States Supreme Court. *Mulready v. Pharm. Care Mgmt. Ass'n*, 145 S. Ct. 131 (2024) (inviting the views of the Solicitor General).

ND House Bill 1584

North Dakota House Bill 1584 ("HB 1584"), as amended, expands the scope of the state's insurance laws governing pharmacy benefit managers ("PBMs") by removing the longstanding exclusion of ERISA-covered, self-insured group health plans from such requirements. Moreover, the recent amendment to the definition of "pharmacy benefit manager" does not, in any way, alter the extent to which ERISA's federal preemption framework prevents application of these state law provisions with respect to self-insured, ERISA-covered group health plans. The amendment merely clarifies that a plan that administers and manages its own pharmacy benefits is not considered a PBM.

[1] Notably, the Tenth Circuit also squarely rejected the State's argument that the state law in question was not preempted by ERISA because the law regulates PBMs rather than the actual health plan. *Id*. at 1194. Many courts have recognized that state laws regulating PBMs function as the regulation of an ERISA plan because most plans cannot operate without a PBM. *Id*. at 1195

Even as amended, HB 1584 continues to pose significant concerns under ERISA's preemption framework. The Supreme Court is currently considering the specific questions raised by the types of regulations at issue in HB 1584, and so the State's authority to regulate in this matter has not been finally determined. Adopting provisions that run afoul of longstanding state exclusions in advance of clarity by the courts will only inject uncertainty for the state's employers that have long relied upon this state law.

Accordingly, a number of provisions are likely preempted by ERISA based on existing Supreme Court jurisprudence, including *Rutledge*. In the following chart, we identify the specific provision, provide a description of the provision, and include the basis for federal preemption.

Proposed Statutory Provision	***Description***	***Reason for ERISA Preemption***
N.D. Cent. Code Ann. § 26.1-27.1-04(2) and 26.1-27.1-04(3) (proposed)	Requires PBMs to accept any pharmacy willing to accept the terms of the PBMs' contracts; requires that PBMs offer opt-in contracts.	This provision limits the ability of ERISA-covered plans to determine the scope of their pharmacy networks, which is inherent in the plan's benefit design. Because the provision requires a specific benefit design choice by the plan sponsor, it should be preempted consistent with the holding in *Shaw*.
N.D. Cent. Code Ann. § 19-02.1-02(14) (applied to PBMs through § 26.1-27.1-04(1))	Prohibits a PBM from requiring a different drug or brand of drug to be dispensed in place of the drug or brand of drug ordered or prescribed without the express permission in each case of the person ordering or prescribing.	This limits the ability of plans to adopt formulary designs that utilize lower cost, therapeutic equivalents. Because the provision requires a specific benefit design choice by the plan sponsor, it should be preempted because it consistent with the holding in *Shaw*.
N.D. Cent. Code Ann. § 26.1-27.1-05	Proscribes the payment terms that PBMs must offer their clients.	This provision could impose acute *and* direct economic burden on plans because it could limit the ability of plans to enter into high-value contracts Moreover, it could directly conflict with ERISA's fiduciary duty to act solely in the interest of the plan. As a result, the provision addresses a central matter of plan administration and fiduciary obligation, and should be preempted per *Gobeille*.