

**ERISA Preemption:
Rutledge v. PCMA and
How It Allows States
to Regulate Insurance**

What is ERISA?

- The Employee Retirement Income Security Act of 1974 (ERISA) is a federal statute that creates a uniform set of rules for the administration of employee benefit plans sponsored by companies and unions (known as “Sponsors”).
- Congress’s goal was to protect plans from the burden of complying with 50 sets of state laws.
- ERISA sets the standards for plan administration by:
 - Requiring Sponsors to act in the best interest of the plan beneficiaries;
 - Requiring “administrators” that the Sponsors hire to run the plans to also act in the best interest of beneficiaries;
 - Requiring plans to report information to beneficiaries and the government;
 - Setting standards for who is eligible to participate in the plan; and
 - Establishing funding levels to ensure the plan can pay for the benefits promised.
- ERISA does not dictate what benefits employers must provide.

What is ERISA preemption?

- Congress included a preemption clause in ERISA to block state laws that could interfere with a sponsor's ability to design and administer one plan for all 50 states.
- **ERISA's Preemption Clause:** "Except as provided in subsection (b) of this section, the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" 29 U.S.C. §1144(a).
- **What does it mean for a state law to "relate to" any employee benefit plan?**
 - Courts have held that a state law "relates to" a plan if it "refers to" or has a "connection with" a plan.
 - "Refers to" focuses on what a state law says; "connection with" focuses on the law's effect on ERISA plans.
 - A state law "refers to" a plan if it singles out employee benefit plans for different or special treatment.
 - A state law has a "connection with" a plan if it regulates a central matter of plan administration or interferes with nationally uniform plan administration.
- The Preemption Clause also contains an exception for state laws that regulate insurance.

What laws does the insurance exception preserve?

- **The exception applies only if a law would be preempted under the “relates to” test.**
- There are two parts to the insurance exception.
 - **ERISA’s Exception for State Laws Regulating Insurance:** “Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance” 29 U.S.C. §1144(b)(1)(A).
 - **Self-Funded ERISA Plans May Not Be Deemed an Insurance Company Subject to State Insurance Regulation:** “Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company . . . for purposes of any law of any State purporting to regulate insurance companies” 29 U.S.C. §1144(b)(1)(B).
- What do these provisions mean?
 - A state law regulates insurance if it:
 - Targets insurance companies; and
 - Substantially affects the risk pooling arrangement between the insurer and the insured.
 - The insurance exception saves a state law regulating insurance that ERISA otherwise would preempt.
 - However, that law can be applied only to plans that purchase insurance to provide benefits; the law cannot be applied to self-funded plans.

How does ERISA preemption impact insurance laws?

- Organizations that represent healthcare providers work with legislators to pass laws that are good for patients and providers.
 - Assignment of benefits;
 - Prior authorizations; and
 - Limitations on retroactive denials of benefits.
- Insurance companies that manage plan benefits ignore the laws based on a belief that the laws are preempted by ERISA.
- Insurance commissioners and attorneys general may be hesitant to enforce laws based on the same belief.

Why is *Rutledge v. PCMA* important?

- The Supreme Court clarified the types of laws that ERISA preempts and rejected some broad interpretations of ERISA preemption in *Rutledge v. Pharmaceutical Care Management Association*, 141 S. Ct. 474 (2020).
 - The Court rejected the argument that a statute that applies to all benefit plans equally is preempted under the “refers to” prong of the analysis.
 - Clarified that ERISA preemption analysis should focus on whether State laws interfere with plan administration by:
 - (1) dictating benefits;
 - (2) determining who is eligible to be a beneficiary; or
 - (3) regulating in areas that ERISA regulates.
 - A state law that passes the *Rutledge* test for avoiding ERISA preemption can apply to all plans, insured and self-funded, regardless of whether the state law regulates insurance.

What was at issue in *Rutledge*?

- **The Issues:** Whether ERISA preempts Act 900, an Arkansas law that:
 - Regulates how much Pharmacy Benefit Managers (“PBMs”) pay pharmacies for dispensing generic drugs; and
 - Creates enforcement mechanisms, including allowing pharmacists to appeal reimbursements or decline to dispense if the payment is below wholesale cost.
- **The Ruling:** The Court ruled 8-0 that ERISA does not preempt Act 900.
- **The Reasoning:** ERISA only preempts State laws that dictate benefits or eligibility determinations, or that regulate an area already regulated by ERISA.
 - State laws that regulate third-party service providers do not “refer to” ERISA plans.
 - ERISA does not preempt cost regulations.
 - Act 900’s enforcement provisions are not preempted because they do not require Sponsors to structure plans a particular way, and at worst they create “operational inefficiencies.”

What are the Key Takeaways from *Rutledge*?

- *Rutledge* addressed whether a State law “relates to” an ERISA plan—*i.e.*, the first step in the analysis that does not depend on the insurance exclusion.
- **Key takeaways:**
 - A state law that regulates benefit plans generally without treating employee benefit plans differently does not “refer to” an ERISA plan for purposes of triggering ERISA preemption;
 - ERISA does not preempt laws that merely change a plan’s costs or incentives, unless those laws force the plan to adopt a particular scheme of substantive coverage; and
 - ERISA does not preempt cost regulations.
- **Additional potential takeaway (currently disputed):**
 - ERISA does not preempt regulation of how third parties provide services to plans.

How have courts applied preemption after *Rutledge*?

- Two federal courts of appeals have addressed the scope of ERISA preemption since *Rutledge*.
 - Eighth Circuit: *PCMA v. Wehbi*, 18 F.4th 956 (8th Cir. 2021).
 - Tenth Circuit: *PCMA v. Mulready*, 2023 WL 5218138 (10th Cir. 2023).
- The decisions conflict.
 - The Eighth Circuit adhered closely to *Rutledge* and interpreted ERISA preemption narrowly.
 - The Tenth Circuit disagreed with the Eighth Circuit and relied on older Supreme Court cases to interpret preemption more broadly.
 - ERISA preemption applies differently depending on whether you are in the Tenth Circuit (Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah).

How will ERISA preemption be applied going forward?

- The ability of states to enforce laws within their traditional authority over insurance and healthcare will be impacted by how the conflict between the Eighth Circuit and Tenth Circuit is resolved.
- Resolution should come in the next 1-2 years.
 - State of Oklahoma has sought rehearing by the entire Tenth Circuit.
 - If rehearing does not resolve conflict, the Supreme Court likely will review to resolve the conflict and prevent a federal statute from being applied inconsistently based on geography.
 - Eighth Circuit's decision appears more consistent with the language and analysis in *Rutledge*.

How *Rutledge* Impacts State Insurance Regulation

- *Rutledge* suggests that States may regulate insurers and third-party service providers who are not designated ERISA fiduciaries without triggering ERISA preemption.
- **Example insurance laws that states should be able to enforce:**
 - Requiring insurers to allow assignment of benefits out-of-network;
 - Regulating retroactive denial of claims after they have been paid; and
 - Requiring insurers to honor prior authorizations.