GROOM LAW GROUP

ERISA Preemption of OR HB 3013 and HB 2725

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 in *Gobeille v. Liberty Mut. Ins. Co*. determined that a state law has an impermissible reference to an ERISA plan and is preempted "[w]here 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." 577 U.S. 312, 319–20 (2016) (internal quotations omitted). Additionally, "ERISA pre-empts a state law that has an impermissible connection with ERISA plans, meaning a state law that governs . . . a central matter of plan administration or interferes with nationally uniform plan administration." *Id.* at 320 (internal quotations and citations omitted). The *Gobeille* decision was cited approvingly by the most-recent Supreme Court decision on ERISA preemption, *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474 (2020). That said, *Rutledge* did expand the scope of permissible state regulation over pharmacy benefit managers in their contractual relationships with pharmacies, which has an indirect financial impact on ERISA-covered plans.

In *Rutledge v. PCMA*, the Supreme Court held that an Arkansas rate-setting statute that set rates with respect to PBMs did not have an impermissible reference to or connection with ERISA-covered plans. It found that any economic impact of the state's rate setting on plans was indirect and did not bind plans' benefit design choices. The Court, in *Rutledge*, did however affirm that preemption should apply where acute, (even if indirect) economic effects effectively bind the benefit choices of plan sponsors under ERISA. The Court's decision also affirmed long-standing precedent that state laws are preempted by ERISA when they impact a core function of plan administration, mandate a certain scheme of benefits coverage, or directly refer to the plan.

Since *Rutledge*, one district court has held that Oklahoma's PBM regulation that directly impacts ERISA-covered plans benefit designs was not preempted by ERISA relying on *Rutledge*. *PMCA v. Mulready*, 598 F. Supp. 3d 1200, 1208 (W.D. Okla. 2022). The court, however, did not provide a thorough analysis of the impact of the state statute on ERISA-covered plans. Rather, the court's conclusory decision relies entirely on the fact that the statute regulates contracts between the PBM and the pharmacy (notwithstanding the direct economic and benefit design impacts of those contractual regulations on ERISA-covered plans). That case is currently on appeal to the Tenth Circuit Court of Appeals. Accordingly, this is a highly unsettled area of the law and the District Court opinion in *Mulready* does not represent the final determination of the extent to which states may regulate PBMs with respect to their ERISA-covered business.

Oregon HB 3013 and HB 2725 impose a host of requirements with respect to PBM services offered to ERISA-covered, self-insured plans. In the following chart, we identify the specific legislative provision, provide a description of the provision, and include the basis for federal law preemption. Unless noted otherwise, the relevant amendments are included in HB 3013.

Proposed Statutory Provision	***Description***	***Reason for Federal Preemption***
ORS 735.534(i)	Applies the provisions of ORS 743A.062 to PBMs with respect to self-funded plans.	Imposes acute economic impacts on ERISA-covered plan and effectively binds the plans' benefit design decisions by eliminating plan choice of economically efficient providers and formulary design.
ORS 735.534(j)	Requires minimum dispensing fee payments determined by the Oregon Health Authority for all solo network pharmacies and pharmacy network chains	Imposes acute and direct economic impacts on plans.
ORS 735.534(j) [HB 2725]	Prohibits PBMs from imposing a fee on pharmacies after the point of sale.	Imposes direct economic impacts on plans and prevents plans from recouping plan assets in conflict with ERISA's fiduciary duties.
ORS 735.534(k) [HB 2725]	Requires PBMs to provide certain notice of any denied or reduced reimbursement.	Imposes requirements that are parallel to or in addition to those required under ERISA's claims procedure.
ORS 743A.062(2)(a)	Prohibits exclusions of certain drugs from the plan's formulary.	Directly binds the benefit design choice of plans administered by PBMs.
ORS 743A.062(2)(c)	Requires the PBM to permit the policyholder to select a preferred pharmacist.	Directly binds the benefit design choice of plans administered by PBMs.
ORS 743A.062(2)(d)	Requires PBMs to accept any willing provider as a preferred network pharmacy.	Directly binds the benefit design choice of plans administered by PBMs.
ORS 743A.062(2)(e)	Prohibits PBMs from paying reduced	Imposes direct economic burden on plans and effectively binds the

Proposed Statutory Provision	***Description***	***Reason for Federal Preemption***
	reimbursements to 340B pharmacies.	plan to specific plan design choices.
ORS 743A.062(2)(f)	Prohibits PBMs from assessing a fee, chargeback, clawback or other adjustment for the dispensing of a 340B drug	Imposes direct economic burden on plans and effectively binds the plan to specific plan design choices.
ORS 743A.062(2)(g)	Prohibits PBMs from excluding a pharmacy from a pharmacy network on the basis that the pharmacy dispenses a 340B drug	Imposes direct economic burden on plans and effectively binds the plan to specific plan design choices in network design.
ORS 743A.062(2)(h)	Prohibits PBMs from restricting the methods by which a 340B drug may be dispensed or delivered.	Imposes direct economic burdens on plans and effectively binds the plan to specific plan design choices.
ORS 743A.062(2)(i)	Prohibits PBMs from restricting the number of pharmacies within a pharmacy network that may dispense or deliver 340B drugs.	Imposes direct economic burden on plans and effectively binds the plan to specific plan design choices in network design.