

Draft: 5/26/22

Employee Retirement Income Security Act (ERISA) (B) Working Group
Virtual Meeting
May 24, 2022

The ERISA (B) Working Group of the Regulatory Framework (B) Task Force met May 24, 2022. The following Working Group members participated: Robert Wake, Chair (ME); Yada Horace (AL); Jason Lapham (CO); Doug Ommen and Andria Seip (IA); Julie Holmes (KS); Victoria Bares and Norman Barrett Wiik (MN); Amy Hoyt (MO); Ted Hamby (NC); Laura Arp (NE); Jeremy Christensen (NV); Laura Miller (OH); Andrew Schallhorn (OK); Tanji J. Northrup (UT); Andrea Jensen (WA); and Richard Wicka (WI).

1. Discussed the May 6 Draft Case Summary of the *Rutledge v. PCMA* Decision for Inclusion in the ERISA Handbook

Mr. Wake said the first item on the agenda is to discuss the May 6 revision of the summary in the case of *Rutledge v. Pharmaceutical Care Management Association* (PCMA) for inclusion in the *Health and Welfare Plans Under the Employee Retirement Income Security Act: Guidelines for State and Federal Regulation* (ERISA Handbook). He explained that the May 6 draft incorporates the comments that were submitted on the Feb. 16 draft by the April 21 deadline. Carl Schmid (HIV+Hepatitis Policy Institute) said the NAIC consumer representatives identified other parts of the ERISA Handbook that need updating. Mr. Wake explained that he would like to focus on incorporating the Rutledge decision into the “Key U.S. Supreme Court Opinions on ERISA’s Preemption Provisions” section of the ERISA Handbook, but he agreed that additional updates to the ERISA Handbook should be considered as part of a more full-scale review at some point in the future.

Cari Lee (Step toe & Johnson LLP) asked for some clarification regarding what was meant by the third sentence in the summary: “Unlike the PBM laws in some states, Act 900 was not structured as an insurance law.” She said it is unclear because Act 900 involves the Arkansas Department of Insurance (DOI). Mr. Wake said the next sentence was intended to clarify what he meant: “It applied to all transactions between PBMs and pharmacies, including transactions where the PBM was acting on behalf of a self-insured ERISA plan, so Arkansas could not rely on the saving clause as its defense against an ERISA preemption challenge.” Mr. Wake suggested making the following revision to the sentence: “Unlike the PBM laws in some states, Act 900 was not strictly structured as an insurance law.” The Working Group agreed that the addition of “strictly” is a helpful change.

Kris Hathaway (America’s Health Insurance Plans—AHIP) suggested the following two revisions to the last paragraph the Rutledge summary:

However, the Court limited its decision to only considered the provisions of the Arkansas PBM law as they stood at the time PCMA filed its preemption challenge, not the amendments the legislature subsequently made while *Rutledge* was making its way through the appellate courts. Additionally, the Court did not address preemption under Medicare Part D and issues that have been raised by PBM and pharmacy laws in other states, including laws regulating provider networks and laws addressing contractual restrictions on discussions between pharmacies and patients. Subsequent to the *Rutledge* decision, additional ERISA challenges continue, at the time of this writing, to make their way through the courts.

Mr. Wake said with respect to the first suggested change, he believes the existing language is more accurate. He said saying the Court “limited its decision” implies certain issues were before the Court and the Court decided not to consider them, which is not the case. The Arkansas law was later amended, but those amendments were never before the Court, so “only considered” language seems to accurately describe the situation. With respect to the second suggested revision, Mr. Wake said Medicare Part D seems to be a peripheral issue, but he agreed that the suggested revision to mention Medicare Part D as an example of an issue not addressed in this case could be helpful for future readers to place the decision in context.

Ms. Arp made a motion, seconded by Mr. Wicka, to adopt the May 6 draft case summary with the “strictly” and “preemption under Medicare Part D and” revisions discussed on the call. The motion passed unanimously.

Having no further business, the ERISA (B) Working Group adjourned.

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