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EEOC Releases Proposed Rules to Implement the Pregnant Workers Fairness Act

Following the recent enactment of the Pregnant Workers Fairness Act ("PWFA") to require employers to provide reasonable accommodations to pregnant employees, the Equal Employment Opportunity Commission ("EEOC") published its proposed rules to implement the law. The proposal includes examples of reasonable accommodations and describes the process by which employees can request accommodations.

Background

At the end of 2022, Congress enacted the PWFA, which requires covered employers to provide "reasonable accommodations" for an employee's "known limitation," defined as a physical or mental condition that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and that the employee has communicated to the employer. Employers covered by the law include public and private sector employers with 15 or more employees, congressional offices, federal agencies, employment agencies, and labor organizations. The law borrows the definition of "reasonable accommodation" from the ADA, which provides that a reasonable accommodation may include making existing facilities readily accessible to the employee, modifying work schedules, and modifying equipment or devices. The law contains an exception from the reasonable accommodation requirement if it would cause the employer an "undue hardship," i.e., an action requiring significant difficultly or expense when taking into consideration certain factors, such as the nature and cost of the accommodation and the financial resources of the employer. The PWFA also prohibits covered employers from requiring an employee to take leave if a reasonable accommodation could be provided that would let them keep working and prevents retaliation against an individual for reporting a violation of the PWFA. The PWFA does not replace other federal, state, or local laws that are more protective of pregnant workers.

The EEOC started accepting charges under the PWFA as of June 27, 2023.

Proposed Regulations

On August 11, 2023, the EEOC published its proposed regulations to implement the PWFA. Comments on the proposed rules are due October 10, 2023. Below are some of the key elements from the proposal.

Known limitations. In the proposed rules, the EEOC provides that the "known limitation" that requires an employer to provide a reasonable accommodation does not require a specific level of severity. The term "known limitation" also covers situations where a worker seeks an accommodation to maintain their health or the health of their pregnancy and avoid more serious consequences. The proposed rules state that, for the most part, the EEOC anticipates that determining whether a limitation or physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions will be a straightforward determination that can be accomplished through a conversation between the employer and the employee and without the need for the employee to obtain documentation or verification. Additional details on documentation requirements are discussed below.

Reasonable accommodations. The proposed rules provide examples of reasonable accommodations in the context of the PWFA. The examples incorporate some accommodations that have long been recognized by the EEOC but are not explicitly included in the examples of reasonable accommodations provided in the ADA's implementing regulations. The examples include, but are not limited to: frequent breaks (e.g., a pregnant employee needing breaks due to shortness of breath); schedule changes, part-time work, and paid and unpaid leave (e.g., a schedule change to allow the employee to attend a round of in vitro fertilization appointments); telework; making existing facilities accessible or modifying the work environment (e.g., allowing access to an elevator not normally used by employees or providing a fan to regulate temperature); and acquiring or modifying equipment, uniforms, or devices.

Requesting an accommodation. The proposed rules provide details on the two-part process an employee needs to follow for requesting an accommodation under the PWFA. First, the employee (or their representative) must identify the covered limitation related to pregnancy or childbirth. Second, the employee (or their representative) must indicate that they need an adjustment or change at work. It is not necessary for the employee to specifically mention the PWFA when making the request.

The proposed rules provide multiple examples of an acceptable request under the PWFA, such as a pregnant employee telling her supervisor that she is having trouble getting to work at her scheduled start time because of morning sickness. An employer is not required to seek supporting documentation from a worker who seeks an accommodation under the PWFA. If the employer does decide to require documentation, it is only permitted to do so if it is reasonable to require documentation under the circumstances for the employer to determine whether to grant the accommodation.

ERISA Preempts Parts of Oklahoma PBM Law, Eighth Circuit Rules

Key provisions of an Oklahoma law designed to help independent pharmacies that want to participate in pharmacy benefit managers' (PBM) networks is preempted by ERISA, according to the Eighth Circuit Court of Appeals. The Eighth Circuit's ruling likely will have ramifications extending beyond the Oklahoma statute, as numerous other states have passed and/or implemented laws targeting PBMs in the recent past. It also could become an issue on Capitol Hill, where Congress is continuing to consider ways to regulate PBMs at the federal level.

Oklahoma Statute

As the Eighth Circuit described in its opinion, four separate parts of the Oklahoma law were at issue:

- Access Standards – PBMs must ensure that all Oklahoma residents live within a certain distance of a retail pharmacy participating in the PBM's retail pharmacy network. The law also prohibits PBMs from using mail-order pharmacies to satisfy these requirements.
- Discount Prohibition – the Oklahoma law allows PBMs to include both retail and mail-order pharmacies in their networks but prohibits them from offering cost-sharing discounts to encourage participants to choose certain pharmacies within the network.
- Any Willing Provider (AWP) – If the network confers preferred network participation status on certain pharmacies, then it must give all network providers the same opportunity to participate.
- Probation Prohibition – Prohibits PBMs from denying, limiting, or terminating a provider's contract because the pharmacy employs one or more licensed pharmacists who have been placed on probation by the State Board of Pharmacy.

ERISA Preemption

The crux of the lawsuit is that federal law preempts the Oklahoma law. More specifically, the argument is that ERISA preempts certain aspects of the law as they relate to ERISA plans, and that Medicare Part D preempts certain aspects of the law as they relate to Part D claims. A federal district court ruled that ERISA did not preempt any aspect of the Oklahoma law, but that Medicare Part D did preempt certain – but not all – of the challenged provisions. On appeal to the 8th Circuit Court of Appeals, Oklahoma did not challenge the district court's conclusions relating to Medicare Part D preemption.

On the ERISA preemption question, the 8th Circuit reversed the district court's judgment, which was based on its conclusion that even though the challenged provisions "may alter the incentives and limit some of the options that an ERISA plan can use, none of the provisions forces ERISA plans to make any specific choices …."

For the 8th Circuit, the key question is this: "Does the state law 'govern a central matter of plan administration or interfere with nationally uniform plan administration'?"

As a threshold matter, the 8th Circuit considered whether a state law that expressly regulates PBMs – and not ERISA plans – is even subject to ERISA preemption. The 8th Circuit noted that the Supreme Court has confirmed that ERISA can preempt state laws even if they "regulate only third parties." Because almost all ERISA plans use PBMs to manage their prescription drug benefits, the 8th Circuit concluded that "regulating PBMs function[s] as a regulation of an ERISA plan itself."

Turning then to the question of whether the relevant provisions of the Oklahoma law "have an impermissible connection with ERISA plans," the 8th Circuit concluded that they do.

With respect to the law's network restrictions (i.e., the Access Standards, Discount Prohibition, and AWP), the 8th Circuit concluded "Each provision either directs or forbids an element of plan structure or benefit design." In other words, "Each network restriction winnows the PBM-network-design options for

ERISA plans, thereby hindering those plans from structuring their benefits as they choose."

As such, "ERISA preempts these provisions because a pharmacy network's scope (which pharmacies are included) and differentiation (under what cost-sharing arrangements those pharmacies participate in the network), are key benefit designs for an ERISA plan."

More specifically, the court concluded:

> Together, these three provisions effectively abolish the two-tiered network structure, eliminate any reason for plans to employ mail-order or specialty pharmacies, and oblige PBMs to embrace every pharmacy into the fold. After these three provisions have run their course, PBMs are left with a cramped capacity to craft customized pharmacy networks for plans. … These network restrictions are quintessential state laws that mandate benefit structures. ERISA forbids this.

Regarding the Probation Prohibition, the 8th Circuit noted that it prevents plans "that want to promote patient safety by maintaining quality assurance standards" from "blocking a disciplined pharmacist from joining the standard network, …removing such a pharmacist from the network …, or even structuring network terms to keep disciplined pharmacists out of the preferred network …. As a result, the court concluded ERISA also preempts this provision.

Medicare Part D Preemption

In addition to the provisions the district court determined were preempted by Medicare Part D, the 8th Circuit concluded the AWP provision was also preempted by Medicare Part D as well. As a result, the court ruled this provision cannot be applied either to ERISA plans or Medicare Part D plans.

Key Takeaways

The 8th Circuit's decision is significant because it sets an important precedent relating to the extent of states' abilities to regulate PBMs. But there are some important limitations:

- The 8th Circuit's decision affects only the Oklahoma law at issue in the case, and not any other state law.
- The scope of ERISA and Medicare Part D preemption is limited only to the extent the relevant provisions are applied to ERISA and Medicare Part D plans. In other words, Oklahoma is still free to apply the relevant provisions to PBMs with respect to non-ERISA plans, such as state and local government plans.
- The 8th Circuit's decision could be appealed to the U.S. Supreme Court.

Future editions of the Rewards Policy Insider will provide updates on this case, as needed.

Ninth Circuit Takes Broad View of What Gives Rise to a Prohibited Transaction

In a recent decision involving a plan amending its contracts with the plan recordkeeper to provide brokerage window and investment advisory services to participants, the Ninth Circuit expressed an expansive view of what constitutes a "prohibited transaction" under ERISA. This decision opens up the possibility of making it easier for plaintiffs to argue that a plan has engaged in a prohibited transaction.

Background

ERISA forbids plan fiduciaries from engaging in "prohibited transactions." One such prohibited transaction involves a plan fiduciary that causes the plan to furnish goods or services between the plan and a "party in interest" (i.e., certain parties that are connected to the plan in some way, such as a service provider). The purpose of prohibiting certain transactions in the retirement plan context is to ensure that a plan does not engage in transactions that result in a conflict of interest and which could, for example, serve a third party's interest but are not in the best interest of the plan participants. However, ERISA provides an exemption for prohibited transactions for service providers where (1) the services are necessary for the establishment or operation of the plan, (2) the contract is reasonable, and (3) reasonable compensation is paid for the services.

The case *Bugielski v. AT&T Services, Inc.* involved a class of participants in AT&T's defined contribution plan. In 2012, AT&T's contract with its longtime recordkeeper was amended to allow the recordkeeper to provide participants access to its brokerage account platform, which allowed participants to invest in mutual funds that were not otherwise available. The recordkeeper received fees through this new arrangement. Two years later, AT&T entered into a contract with an investment advisor to provide participants with optional investment advisory services. Through that agreement and amendments to its contract with the recordkeeper, AT&T authorized the recordkeeper and investment advisor to work together to allow the advisor to access participant's accounts. The recordkeeper and investment advisor then entered into their own contract to allow the recordkeeper to receive a portion of the fees the investment advisor earned through its services. The brokerage window services and third-party advisory services described above are common additional services in defined contribution plans.

The plaintiffs, who were participants in AT&T's plan, brought a lawsuit against AT&T, arguing that AT&T engaged in a prohibited transaction in violation of ERISA when it failed to consider the additional compensation the recordkeeper received due to the new brokerage window and advisory services. In 2021, a California district court found in favor of AT&T, holding that the amended contract did not result in a prohibited transaction.

Ninth Circuit Decision

On appeal from the district court, on August 4, 2023, the U.S. Court of Appeals for the Ninth Circuit reversed the decision of the district court and held that AT&T had entered into a prohibited transaction by amending its existing recordkeeping contracts to add brokerage window and investment advisory services. The court reasoned that, because ERISA's provision banning prohibited transactions is broad, even arm's-length transactions amending an existing contract are technically prohibited transactions. The court also held that, as a plan fiduciary, AT&T was required to monitor the compensation its recordkeeper received through the amended contracts. Unless the case is considered *en banc* by the full Ninth Circuit or appealed to the Supreme Court, the case now goes back to the district court for re-consideration of the issues, including whether the contract amendments qualified for the prohibited transaction exemption for reasonable services (discussed above). The court also addressed an issue relating to the requirement for plan administrators to report certain types of compensation on the Form 5500, which is not discussed in this article.

The decision surprised many court watchers, as the court disagreed with recent prior decisions in the Third and Seventh Circuits, where those courts generally concluded that ERISA does not create an automatic rule preventing service agreements between a plan and a party providing services to the plan, but instead requires some evidence that there is an intent to unfairly benefit a party in interest.

Many view this case as taking an unnecessarily broad view of what is needed to allege that there is a prohibited transaction – specifically, under the Ninth Circuit's reasoning, potentially any situation in which a plan engages additional services from a service provider gives rise to a prohibited transaction, which can provide the basis of a lawsuit. The decision could make it easier for class action plaintiffs to bring claims that a plan has engaged in a prohibited transaction.

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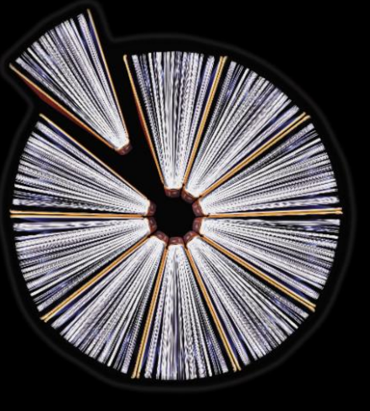

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