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## Health Plans Petition the Supreme Court to Determine Whether FEHBA Preempts State Anti-Subrogation Statutes

The Federal Employees Health Benefit Act (FEHBA) governs federal employee health plans and contains a broad preemption clause comparable to the one found in ERISA.<sup>1</sup> Despite the similarity, state and federal courts are split on whether FEHBA preempts state anti-subrogation laws, causing uncertainty for federal health plans attempting to enforce their contractual subrogation and reimbursement rights. After receiving adverse decisions in state courts, two health plans recently petitioned the U.S. Supreme Court to determine whether FEHBA preempts state laws precluding carriers from seeking reimbursement or subrogation pursuant to the terms of a FEHBA contract. Unless and until this issue is resolved by the Supreme Court, administrators of federal health plans should carefully evaluate the law in their jurisdiction when pursuing subrogation or reimbursement.

For preemption to apply under FEHBA, the contract term must relate to coverage, benefits, or to payments with respect to benefits. 5 U.S.C. § 8902(m)(1). While the U.S. Supreme Court briefly addressed the preemption of anti-subrogation laws in *Empire Healthchoice Assurance v. McVeigh*, 547 US 677 (2006), its discussion was entirely in *dicta*. As a result, courts are divided on whether state statutes prohibiting subrogation sufficiently relate to benefits so as to fall under the purview of FEHBA's preemption clause.

In the most recent case deciding the preemption question, a district court in the Tenth Circuit found that FEHBA does preempt Kansas's anti-subrogation statute and that the federal health plan was entitled to recover the \$76,561.88 in health benefits it paid on behalf of the plaintiff. *Helfrich v. Blue Cross and Blue Shield Association*, 2014 WL 3845143 (D. Kansas Aug. 15, 2014). The *Helfrich* court noted that giving way to state law on the subrogation issue would only frustrate the purpose of the preemption clause—to unify benefits for all federal employees. Other courts have similarly held that FEHBA preempts state anti-subrogation statutes. See *Calingo v. Meridian Res. Co.*, 2013 WL 1250448 (S.D.N.Y. Feb. 20, 2013); *Shields v. Government Employees Hospital Ass'n*, 450 F.3d 643 (6th Cir. 2006), overruled on other grounds by *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009); *Thurman v. State Farm Mutual Automobile Insurance Co.*, 598 S.E.2d 448 (Ga. 2004); *MedCenters Health Care, Inc. v. Ochs*, 26 F.3d 865 (8th Cir. 1994).

In contrast, both the Arizona Court of Appeals and the Missouri Supreme Court have held that FEHBA does not preempt state laws that bar health plans from seeking reimbursement from plan participants, finding that anti-subrogation statutes do not sufficiently relate to benefits to fall within the purview of the preemption clause. These decisions are currently pending certiorari before the U.S. Supreme Court. See *Coventry Health Care of Missouri, Inc. v. Nevils*, No. 13-1305 (docketed Apr. 28, 2014); *Aetna Life Insurance Company v. Kobold*, No. 13-1467 (docketed June 9, 2014).

Until the U.S. Supreme Court addresses whether FEHBA preempts state anti-subrogation statutes, administrators of federal employee health plans will need to carefully evaluate the state of the law in

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their jurisdiction when exercising their contractual subrogation and reimbursement rights. Brownstein's health care attorneys litigate such cases before federal and state courts at both the trial and appellate levels and have a demonstrated strength in protecting a health plan's right to recovery.

<sup>1</sup> In *FMC v. Holliday*, 498 U.S. 52 (1990), the U.S. Supreme Court held that ERISA can preempt state anti-subrogation statutes.

*This document is intended to provide you with general information regarding the state of the law as it relates to FEHBA's preemption of state anti-subrogation statutes. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice regarding an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*

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