



## ERISA—the great equalizer or playground bully?

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**The answer depends on which side of the fence you stand**

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The Employee Retirement Income Security Act of 1974 (ERISA)—a federal law that sets standards for private pension and employee benefit plans—could be a friend or foe.

It all depends on who you ask.

ERISA requires disability and medical plans to provide participants with specific information about plan features and funding, and it establishes certain fiduciary responsibilities for those who manage the plan.

Frank Darras, senior and managing partner for Southern California-based Shernoff, Bidart, and Darras LLP, sees ERISA as bad law that has "rotted everything invented since Adam." In his disability and long-term care practice, Darras said he looks at 2,000 new cases a month from all

50 states that involve people wronged by ERISA.

"There's no teeth in it," he said. "There are no consequences, no remedies, no consumer safeguards, and it's either a license to delay paying when they should or a license to deny benefits when they shouldn't. Or in the circumstance of health insurance, it's really a license to kill."

Under ERISA, Darras said holders of group insurance policies issued by their employers lose their Seventh Amendment right to a jury trial, have no remedy for wrongful death, no right to punitive or punishment damages, no right to extra-contractual damages, and no right to sue in state court.

Mark Johnson, JD, PhD, president of ERISA Benefits Consulting in Grapevine, TX, said ERISA sets up a nationwide standard for how employers operate benefit plans, pension and health care plans, group life insurance, and 401(k) plans.

The policy position behind ERISA, Johnson said, is to limit the exposure employers and health plans face in offering coverage to employees. He explained that the administrative and litigation system that comes with ERISA-covered plans is, in fact, pro defense—but there's a reason for it.

"It's a way to encourage employers to offer plans by shielding them from whatever an attorney can talk a jury into giving," Johnson said. "It is not a level playing field when you litigate an ERISA case. That's by design. You can criticize it or accept it."

### **Losing the right to trial by jury**

One of Darras' biggest complaints about group policies is the inability to file suit in state court. ERISA, he said, requires filing an administrative appeal and suing in federal court. In addition, once the case makes its way to a federal court, there is no jury trial and no discovery.

"You won't testify about the restrictions or limitations. Your doctor won't be asked about why you can't work, your significant other won't talk about what you did before and why you can't do it now," Darras said. "Nobody from the insurance company will be asked any questions under penalty of perjury of what they didn't do."

The case record, he said, is whatever the insurance company sent in on appeal. If the insured can't prove the insurance company denied benefits beyond a reasonable doubt, the insured loses.

"In the majority of cases, the insured can never beat 'beyond a reasonable doubt,'" Darras said. "ERISA hurts. It's unfair. It takes away your constitutional rights. And there is no punishment, no extra-contractual or emotional distress damages. You lose your right to sue if you don't file a timely appeal."

**Johnson** said ERISA litigation is considered equitable litigation and, therefore, does not fall under the Constitutional right to a trial by jury. He added that employees can sue in state court, but in most instances the defendant—usually the insurance company—will move the case to federal court. In addition, ERISA does not govern medical malpractice claims, so that people who feel they are a victim of malpractice can still seek relief through the courts.

Darras contends that most consumers never make it to the courts because they can't find an attorney to represent them on an ERISA case.

"What lawyer would get involved if 70% of cases are lost because remedies are so limited and the benefits are so reduced?" Darras asked. "If you make the courthouse difficult to find and put a criminal standard in front of it, no one will come."

Patricia A. Shlonsky, partner and chair of the Employee Benefits Group for the Cleveland office of Ulmer & Berne LLP, said, "Somebody out there is taking cases," because she spends a great deal of time defending insurance companies and self-insured employers against ERISA cases.

"There are good lawyers out there willing to represent individuals in ERISA cases," Shlonsky said.

### **Individual insurance**

Darras said the problems of ERISA are avoidable. Young ophthalmologists can avoid it completely, he said, by shopping early for individual coverage when it's cheap and inexpensive.

"I like to see physicians buy individual insurance when they're young, fun, and about to make a ton," Darras said. "They can get all the bells and whistles they want on the policies."

Darras recommended buying an individual policy through an agent or broker, and paying for it personally, not through an employer. Having a policy that is portable—not dependent on partners, a practice, or an affiliated hospital or group—is peace of mind for young physicians.

"You didn't spend time in medical school to drive a jalopy and live in a dump," Darras said.

For physicians in a group insurance setting now, who either don't have individual insurance or have a small amount, Darras advised finding a competent insurance agent or broker to submit a trial application to see what kind of policy the company will write.

Shlonsky said although the idea of an individual policy may sound ideal, many individuals won't be eligible simply because of their health status.

Another problem with individual insurance is the cost.

"Individual policies are extraordinarily expensive," Johnson said.

"The price you'd pay for the exact same coverage in a group plan would be dramatically different based on how big the risk pool is."

He said the idea of having individual insurance to have the ability to sue for more money isn't "economically sound."

"You want to get good coverage through a reputable employer or professional association who has screened the ultimate provider and gotten you quality, reliable coverage," Johnson said. "I don't see the logic in spending a lot more money to be in a situation where in case something goes wrong, you'll be able to sue for unlimited damages."

Shlonsky said there are many benefits to group policies, adding that state insurance regulators still maintain control over insurance companies. Any policy offered as an ERISA plan is overseen by the U.S. Department of Labor, offering consumers another option for pursuing disputes with insurers.

She acknowledges the 1974 law hasn't necessarily grown with the complexities of the health-care industry, adding that most of the discussion centers around precertification requirements, preapproval requirements, and the inability to gain coverage for certain health care needs.

"ERISA has done things to improve the situation," Shlonsky said, adding that new claims rules speed up the time period on evaluating an urgent care claim.

"The other thing is if you feel you have an immediate health concern and have precertification requirements and a denial, try to get the health care you need and worry about how to pay for it later," she said.

Darras said he's built his practice on defending everyone from professional athletes to motion picture stars to \$50-a-month blue-collar workers against ERISA policies.

"It's the bully on the playground," he said. "Every bully, every once in awhile, meets its match, and God bless the kid who had the courage to take on the bully."