

## **How to Determine If ERISA Applies to Your Client's Insurance Claim**

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Lawyers are often surprised to learn how pervasive encounters with the Employee Retirement Security Act of 1974 (ERISA) can be. ERISA, codified at 29 U.S.C. § 1001 *et. seq.*, can impact a client in everything from filing for disability benefits after experiencing a serious illness or accident to dealing with medical liens after a successful recovery against a third-party tortfeasor. It can even impact a survivor's entitlement to life insurance proceeds when a loved one has passed. If the benefit is pursuant to coverage obtained at someone's workplace or directly provided by the employer, your client's rights may well be governed by ERISA.

The most common question asked by non-ERISA practitioners is "how can I tell if ERISA applies?" This article identifies the issues that must be resolved before answering this question or before addressing your client's expectations as to how a court may decide it. The success of your representation may ultimately depend on your evaluation of this issue if employment-related benefits are involved.

### **A. What Is ERISA?**

ERISA is a comprehensive Federal statute that applies to many claims for employee benefits. ERISA is a complicated area of the law that, at the end of the day, creates a number of often-byzantine hurdles that an employee or employee's beneficiary (and their attorneys) must clear before they can obtain their benefits.

Congress enacted ERISA in 1974 to address perceived problems of employee's rights not receiving uniform or, in some instances, adequate protection by the laws of the different states in which they worked. Due in part to rising reports of corporate mismanagement, Congress also sought to address corruption and self-dealing involving large pension plans. ERISA's beginnings, therefore, arose out of Congress's intent to afford employee pensions more protection from employers, to empower employees by addressing the disparity in bargaining power between employers and employees in the context of pensions, and to establish uniform national standards. Thus, ERISA was originally intended to apply only to "pension benefits." Fatefully, at the last minute, ERISA was amended to include other employee benefits as well, including "employee welfare benefits" such as health, disability, and life insurance (those benefits implicated in this article).

The language of the ERISA statute draws heavily from trust law as well as contract law. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-113 (1989). Accordingly, when enacting ERISA, Congress has called upon the courts to develop a common law of ERISA using both trust and contract principals. The Department of Labor also has authority to issue regulations governing the processing of ERISA claims.

## **B. So what if ERISA applies?**

From your client's perspective, the largest consequence of ERISA is the limitation on the relief available, a fact that many clients are surprised to learn. In a benefits case, ERISA may limit your client's remedies to include only the recovery of the benefit that should have been provided. Although in some instances it may be possible to recover interest on past-due monetary benefits and to recover attorneys' fees (an event that can be unusual in Eleventh Circuit courts), no other award is typically permitted, including punitive damages.<sup>1</sup> Furthermore, all state law remedies, including insurance bad faith and fraud, are (with very few exceptions) precluded. 29 U.S.C. § 1144(a).<sup>2</sup> This "superpreemption" also means that even though ERISA grants concurrent jurisdiction to both state and federal courts, ERISA cases may land in federal court if defendants want them there due to the existence of "federal question" jurisdiction. So, you may find the first notice you receive that your claim implicates ERISA is when you receive notice of removal from state court.

Many lawyers are also often surprised that in ERISA litigation, courts often suspend the normal rules of civil procedure, especially in the realm of discovery. Under ERISA, a claimant typically must present all of his or her evidence to the insurance company before filing suit. The claimant may also be required to pursue internal appeals with the insurance company and "exhaust" administrative remedies before a court will entertain suit. Once suit is filed, in the vast majority of cases the court will prohibit all merits-related discovery, limit the scope of review to the materials before the claim administrator who denied the claim and review that claim decision under a highly deferential "abuse of discretion" standard. The court then will decide the case based on briefs or, in rare circumstances, upon conducting a bench trial; in ERISA there are no jury trials.

The unusual degree of difficulty inherent to most ERISA claims is not insurmountable if the attorney is knowledgeable about ERISA's procedures. The subject of ERISA litigation strategies, however, is a more advanced topic that is beyond the scope of this article.

## **C. Identifying an ERISA-Governed Plan**

An "employee welfare benefit plan" under ERISA includes any insurance plan "established or maintained by an employer or by an employee organization, or by both...." 29 U.S.C. § 1002(1). Although 29 U.S.C. § 1102(a)(1) requires plans to be "established and maintained pursuant to a written instrument," the Eleventh Circuit nevertheless has held that ERISA plan may exist even without a "formal, written plan." *Donovan v. Dillingham*, 688 F.2d

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<sup>1</sup> In an interesting development, the United States Supreme Court recently suggested "surcharge" remedies should be available but the case law on such remedies in the context of ERISA claims is extremely limited. *See Cigna Corp. v. Amara*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011).

<sup>2</sup> The only state laws excluded from ERISA's preemption clause are those qualifying under its savings clause, § 1144(b)(2)(A), which states, "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulated insurance, banking, or securities."

1367, 1372 (11th Cir. 1982)(en banc) . In *Dillingham*, the Court held this “established and maintained” requirement can be satisfied “if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.” *Id.* at 1373. This same test is used in all other circuits. *See Williams v. WCI Steel Co., Inc.*, 170 F.3d 598, 602 n.3 (6<sup>th</sup> Cir. 1999) (reporting that “every other circuit” has adopted the *Dillingham* test).

Importantly, not all employee insurance plans are ERISA-governed plans. The Department of Labor has clarified through the issuance of regulations that some policies made available through work are not ERISA plans because they fall under ERISA’s “safe harbor” provisions. *See* 29 C.F.R. § 2510.3-1(j); *see also, e.g., Anderson v. Unum Provident Corp.*, 369 F.3d 1257, 1262 (11th Cir. 2004). This “safe harbor” exception applies if: (1) the employer or employee organization does not make any contributions to the plan; (2) the employee’s participation in the plan is voluntary; (3) the involvement of the employer or employee organization with the plan is limited to permitting the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues check-offs and to remitting them to the insurer, but without endorsing the plan itself; and (4) the employer or employee organization receives no consideration in connection with the program, other than reasonable compensation, excluding any profit, for very limited administrative services. 29 C.F.R. § 2510.3-1(j). Reported decisions, however, show this exception to be difficult to meet, especially where the employer involved itself even in the slightest in assisting employees in procuring the insurance. In this regard, an employer can “establish and maintain” an ERISA plan even if it never had any intent of doing so. *See Anderson*, 369 F.3d at 1263-64.

Equally uncommon is having a benefit scheme that qualifies not as an ERISA plan, but as simply a “payroll practice,” which Department of Labor regulations exclude from ERISA’s application. 29 C.F.R. § 2510.3-1(b). Employee benefits of this nature include, naturally, compensation the employee receives for things like overtime and also vacation pay. They also include, however, compensation paid to an employee on account of his or her inability to work due to disability or other medical reasons, as long as the compensation is paid out of the employer’s “general assets.” *See generally Stern v. International Business Machines, Corp.*, 326 F.3d 1367 (11<sup>th</sup> Cir. 2003).

The most successful means to escape ERISA’s clutches is based on the kind of entity the employer is. For instance, ERISA does not govern welfare benefit plans established and maintained by governmental entities. 29 U.S.C. § 1003(b)(1); 1002(32). Neither does ERISA apply to plans created by religious organizations that are tax-exempt pursuant to 26 U.S.C. § 501 or their associated corporations, *see* 29 U.S.C. § 1003(b)(2) and § 1002(33), unless the religious organization has elected to “opt in” pursuant to 26 U.S.C. § 410(d). Determining whether a valid election has occurred requires obtaining the forms and examining whether they comply with 26 C.F.R. § 1.410(d)-1.

#### **D. Identifying Those Who the Plan Covers**

In determining whether ERISA applies to a particular claim, an attorney must also keep in mind whether the person whose benefits are at issue is indeed a “participant” in the plan or the

beneficiary of such a participant. A “participant” is “any employee or former employee of an employer, ... who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer ..., or whose beneficiaries may be eligible to receive any such benefit.” 29 U.S.C. § 1002(7). ERISA defines an “employee” as “any individual employed by an employer.” 29 U.S.C. § 1002(6). This issue goes back to ERISA’s intent to make up for the disparity in power between employees and employers in the context of ERISA benefits. Thus, this employer-employee relationship is crucial to determining whether ERISA governs the claim.

Attorneys who find themselves handling an offhand ERISA case but who do not specialize in the area sometimes become surprised to learn that persons having an ownership interest can also be considered “employees” for purposes of ERISA. In *Raymond B. Yates, M.D. Profit Sharing Plan v. Hendon*, the Supreme Court found that a working owner can have dual status as both an employer and employee entitled to participate in the plan. 541 U.S. 1, 16, 124 S.Ct. 1330, 1341, 758 L.Ed.2d 40 (2004). That holding overturned the all contrary decisions in lower courts concluding previously that an owner could never be a participant in an ERISA plan. *Id.* at 18-24.

## **E. Conclusion**

The key to preparing a successful ERISA claim begins early – often during the administrative remedies portion of the claim. Assessing whether ERISA applies should be done as soon as the claim arrives on your desk. If, for example, a client with a denied insurance claim asks you to “write a letter” to persuade the insurance company to pay the claim, *beware*. Your letter could be considered an “appeal” under the terms of the ERISA plan. If you fail to submit all the evidence in support of the claim with that “appeal” the insurance company could render a quick decision on the “appeal” and uphold the denial of the claim. Thus, the opportunity to include documentation supporting the claim during the subsequent litigation could be denied.

Knowing whether ERISA applies at the front-end of your engagement will allow you not only to advise your client better about what his or her rights and remedies may be, but also to prepare for what lies ahead. In that event, you will need to be prepared for transfer of your case to federal court, often-strict limitations on discovery, a deferential standard of review heavily favoring your opponent, no opportunity for a jury, and restrictions on what remedies you can obtain.

But if you find you are unable to avoid having ERISA apply to your case, do not despair: many can and do prevail when their cases have been properly prepared with ERISA’s many nuances in mind. But they are always prepared from the beginning for the adversity they will be facing. The important thing is to know as soon as you can if ERISA applies so that such preparations, including the pursuit of necessary and important ERISA litigation strategies, can be made.