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Employer Liability Provisions in Selected Patient Protection Bills

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Summary

The liability of a self-insured employer in state court for group health plan related actions is generally preempted by ERISA. However, an employer who acts as the administrator of the health plan can be liable for breach of fiduciary duty under ERISA.[1] Some federal courts have also found self-insured employers liable under theories of vicarious liability and direct negligence.[2] The extent to which employers can be found liable in any of these situations varies depending on the employer's level of participation in the administration of the plan and the plan's decision making process regarding claims for benefits.

In the various patient protection bills introduced in the 106th and 107th, Congress attempted to address the issue of employer liability by limiting liability to certain persons or circumstances. While both the House and Senate passed patient protection legislation in the 107th Congress, no agreement was reached with regard to the liability provisions in the bills and neither was sent to the President. This report provides an overview of the employer liability provisions of selected bills from both the 106th and 107th Congress, and will be updated as events warrant in the 108th Congress.

In both the 106th and 107th Congress legislation seeking to amend the Employee Retirement Income Security Act of 1974 (ERISA) to allow state or federal causes of action against group health plans for personal injury or wrongful death was introduced. Currently, ERISA preempts "any and all State laws insofar as they may now or hereafter

[1] *See* Hamilton v. Allen-Bradley Company, 217 F.3d 1321 (11th Cir. 2000).

[2] Damon Henderson Taylor, *ERISA Preemption: Will the Elimination of the ERISA Preemption Clause Help or Harm America's Ability to Deal with Its Pending Health Care Crisis?*, 14 J.L. & Health 133, 160 (2000). *See* Cooney v. South Central Bell Telephone Company, 1992 WL 46381 (E.D. La.), Civ. A. No. 91-3870.

relate to any employee benefit plan . . ."[3] ERISA creates a civil enforcement scheme that allows a participant or beneficiary of a plan to bring a civil action in federal court to recover benefits due to him under the terms of the plan, to enforce his rights under the plan, or to clarify his rights to future benefits under the plan.[4] Should ERISA be amended to allow state or federal causes of action for personal injury or wrongful death, managed care organizations could be subject to liability for benefit determinations. In addition, employers who self-administer group health plans could also be subject to liability. Several of the bills that were introduced included provisions that attempted to shield employers from liability or limit employer liability under certain circumstances. Four approaches to employer liability are discussed in this report.

Designated Decision Maker

In the 106th Congress, both H.R. 5628 and Senate Amendment No. 3694 included provisions for the appointment of a "designated decision maker" for purposes of liability in suits against a group health plan.[5] The "designated decision maker" approach to liability was also used in the Norwood Amendment to H.R. 2563, as passed by the House during the 107th Congress.[6] Under these provisions, the "designated decision maker" would have been "liable to the participant or beneficiary for economic and noneconomic damages" in connection with a breach of a duty of care or a failure to act which was the proximate cause of injury to, or the wrongful death of, the participant or beneficiary.[7]

Presumably, these provisions were intended to designate a particular person or entity that would have been named in a suit brought against the plan and would have been held liable for any damages that were awarded. Under the various provisions, the designated decision maker was defined as a plan sponsor, a health insurance issuer, or any other person who could carry out the responsibilities set forth in the plan, carry out the requirements of the legislation, and meet other applicable requirements, including any financial obligation for liability.[8] If the employer simply provided health insurance coverage as a benefit of employment and did not administer the plan, the plan's designated decision maker would have been held liable and the employer would have been shielded from liability. However, if the employer self-insured and self-administered the health insurance plan provided for its employees, the employer would have been responsible for appointing the designated decision maker and the designated decision maker likely would have been an employee of the employer-plan administrator.

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[3] 29 U.S.C. 1144. For a detailed discussion of ERISA preemption, see CRS Report 98-286, *ERISA's Impact on Medical Malpractice and Negligence Claims Against Managed Care Plans*, by Angie A. Welborn.

[4] 29 U.S.C. 1132(a)(1)(B).

[5] H.R. 5628, 106th Cong., Sec. 201; Nickles Amendment No. 3694, 106th Cong., Sec. 231.

[6] H.R. 2563, as passed, 107th Cong., Sec. 402. *See also* S. 889, 107th Cong., Sec. 141; H.R. 2315, 107th Cong., Sec. 141.

[7] *Supra* n. 5 and 6.

[8] *Id.*

In cases where the designated decision maker is an employee of the employer-plan administrator, it appears that the employer may be liable for the damages resulting from the designated decision maker's breach or failure to act. In general, an employer can be held vicariously liable for the tortious act of an employee under the theory of *respondeat superior* if, at the time of the tortious act, the employee was acting within the scope of employment.[9] In addition, the employer may be responsible for paying damages incurred as a result of the employee's tortious act.[10] These principles would likely apply in the case of a health plan that is self-insured and is being self-administered by the employer who appoints a designated decision maker. The designated decision maker, acting within the scope of employment as an employee of the employer-plan administrator, would be held liable for personal injury or wrongful death resulting from the breach or failure to act, but the employer-plan administrator could apparently be held vicariously liable, and thus could be required to pay damages.

Direct Participation

H.R. 526, introduced in the 107th Congress, did not authorize a cause of action against "an employer or other plan sponsor maintaining the plan (or against an employee of such an employer or sponsor acting within the scope of employment)" unless the employer or other plan sponsor directly participated in the decision of the plan upon consideration of a claim for benefits or upon review of a denial of a claim for benefits, or directly participated in the failure to "exercise ordinary care in the performance of a duty under the terms and conditions of the plan."[11] "Direct participation" was defined as "the actual making of such decision or the actual exercise of control in making such decision or in the conduct constituting the failure."[12]

"Direct participation" was to be construed so as to exclude "any form of decisionmaking or other conduct that is merely collateral or precedent" to the decision or failure.[13] Specifically, the bill excluded from "direct participation" any participation in the selection of the group health plan or health insurance coverage involved; any engagement by the employer or other plan sponsor in any cost-benefit analysis undertaken in connection with the selection of, or continued maintenance of, the plan or coverage involved; any participation in the process of creating, continuing, modifying, or terminating the plan or any benefit under the plan, if such process was not substantially focused solely on the particular situation that is the subject of the cause of action; and any participation in the design of any benefit under the plan, including the amount of copayment and limits connected with such benefit.[14]

Under H.R. 526, an employer would have been shielded from liability unless it directly participated in the decision or failure as defined above. An employer who simply

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[9] 27 Am. Jur. 2d *Employment Relationship* § 459 (1999).

[10] 27 Am. Jur. 2d *Employment Relationship* § 492 (1999).

[11] H.R. 526, 107th Cong., Sec. 302.

[12] *Id.*

[13] *Id.*

[14] *Id.*

provided insurance as a benefit to its employees likely would not have been involved in such decisions. In a case in which an employer self-insured and self-administered the health plan, the extent to which the employer participated in the decision making process would likely vary according to the size of the plan and how the employer chose to administer the plan. If the employer was directly involved in the decision making process regarding the denial or failure that is the subject of the cause of action, the employer would have been subject to liability for that decision. If the employer was not directly involved and decisions were made by a benefits administrator, the employer likely would have been shielded from liability unless the employer had exercised control in the decisionmaking process. However, if the benefits administrator was an employee of the employer-plan administrator, the principles of vicarious liability, as discussed above, would likely apply and the employer could have been required to pay damages.

Discretionary Authority

H.R. 2990, passed by the House in the 106th Congress, did not authorize a cause of action against "a group health plan or an employer or other plan sponsor maintaining the plan (or against an employee or such a plan, employer, or sponsor acting within the scope of employment)" unless the action was based upon "the exercise by the plan, employer, or sponsor of discretionary authority to make a decision on a claim for benefits covered under the plan or health insurance coverage in the case at issue," and the exercise of such authority resulted in personal injury or wrongful death.[15] Discretionary authority was not defined in the legislation. However, certain activities were not to be construed as an exercise of discretionary authority. The exercise of discretionary would not have included "the decision to include or exclude from the plan any specific benefit; any decision to provide extra-contractual benefits; or any decision not to consider the provision of a benefit while internal or external review is being conducted."[16]

Under H.R. 2990, an employer would have been shielded from liability unless it exercised discretionary authority with regard to a decision on a claim for benefits covered under the plan or health insurance coverage in the case at issue. An employer who simply provides insurance as a benefit to its employees would not likely be involved in such decisions. However, an employer who self-administers a benefit plan may exercise discretionary authority. If such discretionary authority was exercised and resulted in personal injury or wrongful death, the employer would be subject to liability.

Hybrid Approach

S. 1052, as passed by the Senate in the 107th Congress, used a hybrid of the "direct participation" and "designated decision maker" approaches to provide employers with greater protection against liability in both federal and state causes of action. Additionally, group health plans that are self-insured and self-administered by an employer, as well as multiemployer plans that are self-insured and self-administered, would not have been held

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[15] H.R. 2990, 106th Cong., Sec. 1302(a).

[16] *Id.*

liable under the federal cause of action for the performance of, or the failure to perform, any nonmedically reviewable duty under the plan.[17]

As introduced, S. 1052 included the direct participation language similar to that in H.R. 526. This language was retained in S. 1052, as passed, and added by an amendment introduced by Senator Snowe (S.Amdt. 834) were "designated decision maker" provisions similar to those in the Norwood Amendment to H.R. 2563, as passed by the House during the 107th Congress.

Under S. 1052, as passed, and H.R. 2563, as introduced, a cause of action would not have arisen against an employer or plan sponsor unless there was direct participation by the employer or plan sponsor in the decision of the plan upon consideration of a claim for benefits or upon review of a denial of a claim for benefits.[18] Notwithstanding the direct participation of an employer or plan sponsor, in any case in which there was deemed to be a designated decision maker, all liability of the employer or plan sponsor would have been transferred to, and assumed by, the designated decision maker. Thus, the employer or plan sponsor could have completely shielded itself from liability, even if it had directly participated in the decision making process, by naming a designated decision maker.

The Snowe Amendment to S. 1052 also added language shielding plans that are self-insured and self-administered by an employer and multiemployer plans that are self-insured and self-administered from liability under the federal cause of action. H.R. 2563, as introduced, included this provision as well.

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[17] S. 1052, as passed, Sec. 402.

[18] *Id*. Direct participation is defined as it is in H.R. 526.