



Position Statement

on
ERISA

(Approved by the Board of Directors January 23, 1999)

The Employee Retirement Income Security Act of 1974 was designed to protect pension benefits of retired employees. ERISA created uniformity among benefits, especially those provided by multi-state employers. In doing so, the benefits of over 120 million Americans protected under ERISA are exempt from state regulation and laws.

When ERISA was created, managed care was in its early days. Managed care is now in the mainstream and very often the type of health care coverage chosen by many large benefits managers. Because of its age, ERISA is out of date with respect to current health care benefits. For example, ERISA has been interpreted by the courts to include exemption from state laws regarding malpractice and negligence lawsuits against health plans that contract with employers under ERISA, the basis being that ERISA is considered a contract to provide benefits. Under ERISA, if a health care plan delays or denies a test, referral, or treatment, it is considered a breach of contract. Under a breach of contract decision, only the cost of the delayed or denied issue is recognized: it is not considered malpractice and therefore no punitive or pain and suffering awards can be granted. This is commonly referred to as the “ERISA loophole”.

This “loophole” raises many issues. Patients do not have the right to sue the health care plan for negligence due to decisions made by the health care plan. At the same time, patients lack leverage against the health care plan regarding decisions made affecting their health. Physicians continue to be sued for malpractice for the negligent medical decisions and policy restrictions of health care plans that result in injury to patients. The current system allows health care plans to avoid responsibility for the consequences of their medical policies and decisions.

The ERISA exemption has been challenged in many courts, but most recently the Texas legislature enacted legislation that allows patients to hold health maintenance organizations liable for negligent medical policies and decisions resulting in injury to patients. Although this new law is being challenged in the courts, it is a significant development in the movement to reform ERISA.

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States often need latitude to develop revenue sources to meet the health care needs of their residents. ERISA regulations often exempt self-insured plans as sources of revenue to expand care to uninsured and underinsured residents. ERISA plans are exempted from state statutory rate setting authority and ability to set global budgets. ERISA protection prevents states from exercising their regulatory authority over insurance reform. State mandates, such as direct access to dermatologic care and anti-gag rules, are exempted by ERISA regulations. ERISA prohibits states from collecting data from self-insured plans on utilization, health care outcomes, access to specialists, and appeals procedures for patients and providers.

The AAD supports ERISA reform and recommends the following:

1. Reform of the ERISA law to remove the statutory preemption and permit patients to sue self-insured employee health benefit plans in state courts for malpractice, including negligent medical policies and utilization decisions. The Academy supports the removal of the ERISA preemption in conjunction with federally mandated, MICRA-type, medical malpractice reforms and a strong internal/external appeals mechanism for all health insurance plans.
2. Sharing of information with the US Department of Labor, which oversees the enforcement of ERISA.
3. Support of AMA initiatives for ERISA reform.
4. On-going education of AAD members, patient advocacy groups, and the public with regard to ERISA.
5. Encourage ERISA reforms to allow states to regulate the administration of health care plans to insure access to care and fairness for all in the health care system.
6. The AAD should strongly support ERISA reforms that are consistent with previous Academy position statements or opinions on direct access to specialty care, any willing provider provisions, anti-gag rules, and due process for physicians.
7. Future ERISA reforms should allow direct contracting between physician and patient.