

Position Statement

on ERISA

(Approved by the Board of Directors January 23, 1999; Revised April 28, 2018)

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.

ERISA was created to provide federal regulation of employee benefit plans, including health benefit plans. Many employee health benefit plans are shielded from state laws through two ERISA clauses, the “savings” and “deemer” clauses. The effect of these clauses is to limited state regulation of health insurance plans and have been interpreted by the courts as preempting state laws regarding state covered benefit requirements, malpractice, and negligence lawsuits against health plans that contract with employers under ERISA.

Further, ERISA provides managed health care plans the ability to unilaterally perform “utilization review” providing plans an opportunity to delay or deny a test, referral, or treatment to determine medical necessity. Protection of patients is provided through the remedy clause, but the interpretation of this clause limits it to a breach of contract decision, and only the cost of the delayed or denied issue is recognized. Delayed or denied treatment because of utilization review is not considered malpractice and therefore no punitive or pain and suffering awards can be granted.

This interpretation of the remedy clause raises several 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. 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. On-going education of AAD members, patient advocacy groups, and the public with regard to ERISA.
4. Encourage ERISA reforms to allow states to regulate the administration of health care plans to ensure access to care and fairness for all in the health care system.
5. Reforms that are consistent with previous Academy position statements or opinions on direct access to specialty care, any willing provider provisions, anti-gag rules, timely payment of clean claims, and due process for physicians.
6. Future ERISA reforms should allow direct contracting between physician and patient.
7. Legislation at the Congressional level to make changes in ERISA that would allow patients with more than one insurance coverage to choose the order of billing to their insurance companies.