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ERISA Bills No Answer to Preemption Problem

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Two bills have recently been introduced in the U.S. Congress that are being misunderstood by some as initiatives to repeal the federal preemption of state insurance equality laws under the Employee Retirement Income Security Act (ERISA) statute. We at the ICA sincerely wish this were the case, but it most certainly is not.

Senators Howard Metzenbaum, (D-Ohio) and Edward Kennedy, (D-Mass.) have introduced legislation, S. 794, that might easily be misinterpreted. The summary of the legislation printed at the beginning of the bill describes the intent as being: "To amend the ERISA of 1974 to provide that said Act does not preempt certain state laws." The key in all of this is the word "certain," and Senator Metzenbaum has made it clear that state insurance equality laws and laws mandating benefits are not the ones he is seeking to protect.

On the House side, Rep. Howard Berman (D-Calif) has introduced H.R. 1602, a bill with the similar intent of the Kennedy and Metzenbaum legislation.

These are not bad bills. They seek to insure that unscrupulous insurance companies are not able to hide behind the ERISA exemption for immunity against state laws regulating unfair insurance claims practices. They will provide a basis for insurance beneficiaries to sue health plans that deny legitimate claims or otherwise act in bad faith. The ICA enthusiastically supports these goals and is committed to work for the prompt passage of both S. 794 and H.R. 1602. This is important consumer protection legislation. While it does not offer any relief to the chiropractic profession, it will substantially augment the rights of self-insured plan beneficiaries.

It is very important to recognize the limits of these bills. It is tempting to jump to the conclusion that somehow a loophole can be found in these proposed amendments through which the chiropractic situation might be remedied. This is not going to happen.

For chiropractic, the battle must continue with the ERISA situation. However, one provision of S. 794 offers our profession an interesting opportunity. Section (c) of the Metzenbaum-Kennedy bill calls for the Secretary of Labor to "... conduct a study of the effect of the provisions of ERISA of 1974 which provides for the preemption of state laws relating to employee benefit plans," and to report to the Congress within one year. Should this proposal be enacted, ICA believes that this might serve as an ideal forum to educate policy makers in both the legislative and executive branches on the grossly unfair and anti-competitive impact the ERISA exemption is having on chiropractic patients and the profession.

When and if the Secretary of Labor begins collecting information on the ERISA issue, the chiropractic profession must respond with a comprehensive, well documented, and emphatic representation of our case. The ICA will certainly work hard to take maximum advantage of this opportunity and work willingly with any chiropractic organization that shares our goal.

The forces lined up to defend and maintain the ERISA exemption as it presently stands are incredibly strong. Business sees the self-insured exemption as a means to keep health benefits

limited. Organized medicine sees ERISA as a means of maintaining their marketplace domination. Labor is inclined to support ERISA as it stands because it exempts the products of collective bargaining from state regulation. Of course, the insurance industry sees it as a way to avoid state regulation, and to provide reduced levels of coverage because they are able to ignore state mandated benefits.

This is a coalition that is not going to be easily defeated. However, this is by no means a situation without hope.

We at the ICA believe that an objective look at the ERISA situation would reveal high levels of abuse and misrepresentation. We believe that many health benefits plans claiming the ERISA exemption are not entitled to that status. They are able to succeed in this misrepresentation because enforcement under ERISA is virtually nonexistent; even if this were not the case, there are no real penalties for improperly claiming ERISA status.

The ICA is working with both the House and Senate staffs to develop legislative language that would put some teeth in the compliance sections of the ERISA law.

At present, health plans, more or less, declare themselves as self-insured and therefore eligible for the exemption provisions of the ERISA law. ICA is developing legislative proposals that will require a detailed filing of benefit plans with the Department of Labor and with state insurance commissioners, requiring declarations of accuracy, under penalty of perjury. Such declarations would be updated and renewed periodically. ICA also supports serious fines or penalties for every day an ERISA plan improperly claims exemption.

The issue of maintaining the ERISA exemption may not be one which the chiropractic profession can challenge head-on and win. However, the fair enforcement of this law is something which consumer oriented members of Congress would find it very difficult to oppose.

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