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IS ERISA BETTER TODAY, IN 2022, THAN IT WAS AFTER ITS 1974 ENACTMENT?

A Call for Change?

by Jeffery Mandell, Consultant

In connection with my slowing down, I got to thinking a bit about ERISA in terms of the big picture. So I asked, is ERISA better today than it was when I started my ERISA practice in 1982, and even back to its enactment? More specifically, does ERISA (enacted in 1974 with its regulations thereafter) better meet its objectives after these last 48 years of continuous and detailed statutory, regulatory, subregulatory, and judicial changes?

The answer depends mostly on the lens through which the question is answered. Is it from the perspective of employers, or employees, or accountants, actuaries, TPAs, recordkeepers, attorneys, financial institutions and so on. The answer also depends on the particular meaning of "better" for the specific question that is posed.

In this article, first I will briefly provide a context for us. I then will answer the question based on my four decades of experiences as an ERISA lawyer in private practice.

Why ERISA and What Is It? Federal law never mandated, and still does not mandate, that employers establish and maintain a retirement plan. But if an employer does maintain a plan, it must follow stringent rules intended to advance the federal government's policies and interests. The incredible tax benefits that inure to employers and employees, which flips on its head basic tax principles, are to encourage the establishment of plans, coordinated with and augmenting Social Security.

The Employee Retirement Income Security Act of 1974, as amended (ERISA) was born because of a mix of excellent reasons, including largely to protect employees from unscrupulous actors, and to set forth concrete rules that employers must follow for its employees. ERISA's concrete rules include governing such things as eligibility, vesting, hours of service, time of payment, form of payment, funding, the nondiscriminatory allocation of benefits, coverage of rank-and-file employees, anti-alienation, the PBGC, reporting to the government, disclosures to employees, and so forth. The U.S. Department of Labor and IRS are the two predominant agencies of ERISA.

Readers: To skip this background, go to the next section

With respect to the handling of plan monies and plan operations, that is, fiduciary conduct over the plan, ERISA sets forth inviolable principles to secure such assets and advance employees' retirement interests. Two examples include to hold retirement assets in a trust and to act solely in the employees' best interests.

ERISA also was intended to provide employees with an effective redress to wrongs perpetrated mostly by employers, fiduciaries, and unions. Key to this was that when the courts judged ERISA fiduciary conduct, they interpreted it to impose the very highest legal bar, the highest standard in all U.S. law. ERISA provides "zero tolerance principles" (my words) fiduciaries must satisfy to conduct themselves exclusively for the employees' best interests. I am not suggesting that this highest legal bar is a difficult standard to meet; it's quite the contrary, actually, in most situations.

ERISA when enacted, to my knowledge was not much about protecting employees or employers from the financial institution industry that had not yet become the strong, dominant influence it has today, with its incredible foothold in the retirement plan marketplace. That influence only happened after 1974 with the growing explosion of 401(k) plans and the co-occurring explosion of the financial institution industry in the retirement plan arena. The interplay of these two co-existing boons would be interesting to understand. Was it the Aristotlian chicken and egg paradox, or something of greater causality or something else? Along with the very good financial institutions provide, employers and employees suffer from their mistakes and fiduciary violations. It is simply very hard, impossible in actuality, to correctly do all that ERISA demands for everyone involved.

ERISA resulted from a mix of excellent reasons

ERISA also provides a national framework for uniform law and the federal government's enforcement of retirement and health-related tax laws and other ERISA requirements. Forged together by many different interests and stakeholders, ERISA is a great piece of legislation. Its enactment was necessary to sustain a robust, stable, and lawful private U.S. retirement system.

The Employees' Perspective. To answer my question whether ERISA has improved since its enactment in 1974, I consider the question first through the lens of employees. To me this is the logical first priority for this inquiry. After all, ERISA is mostly about the employees; consider the name "Employee Retirement Income Security Act." I ask three questions from that perspective. After that I will briefly propose some views from the employers' perspective. I do not here discuss my perceptions of the past 48 years' impact on other stakeholders, for example, consultants, actuaries, TPAs, and CPAs. The article closes with a little rah-rah for a better day.

ERISA first through the eyes of employees

First Question: Has the volume of law changes improved the lot of employees? I believe the law since 1974 has improved protections and moved the needle some, but just some. Without limitation, we have considerably shorter vesting schedules, quicker plan eligibility, and more and improved disclosure requirements to employees (if they were to read them and if the providers did a better job writing them to be "understandable" and neither inconsistent nor confusing, as ERISA requires). We also have important additions to provide plan benefits for spouses of participants, QDROs, recognition of same sex marriages, expedited, more robust and fairer claims procedures, and the implementation of laws, e.g., affiliated service groups and leased employees, that knocked out some outrageous legal techniques (in my opinion) some small employers utilized to entirely exclude certain rank-and-file employees from their plans or minimize their retirement benefits to nothing or about next to nothing, when providing very rich benefits to high-paid earners and owners. Another key beneficial development has been the reduction of expenses charged plan participants brought about by the confluence of excellent proposed and finalized DOL regulations and a small group of plaintiff class action lawyers ready to capitalize on the opportunity they saw.

The cascade of changes since ERISA moved the needle just some

Second Question: Do employees have greater retirement assets (relative to COLAs) and are more employees covered by a retirement plan? I do not know off-hand whether employees are better or worse off than in 1974, and I don't think it matters. What I do know is that still today, the number of employees covered by a retirement plan is woeful, as is the amount of the nest egg for employees. Study after study reveals the sorry state of our nation's retirement readiness. Regardless of various current (as in past) legislative initiatives, they provide me with zero comfort that tomorrow will be different than it is today. The appetite for meaningful change has not been and is just not there.

It does not require a study to inform any experienced ERISA person of our sad state of affairs. However, for those who do not know this, one will see studies that reveal, for example, things like this (there are lots of studies, and so please don't get nit-

picky with me; the gist is not disputable): 40% of full-time employees do not have access to a retirement plan; less than half of small businesses offer a retirement plan and most (87%) are just 401(k) plans that allow participants to make contributions; only about one-half of Americans save for retirement; 41% of Americans do not contribute to a retirement plan; 49% of Americans age 55-66 had no retirement savings in 2017; and so on.

Employees are still horribly positioned for retirement; that has not changed

But really for me, I think about the question and the answer not in numbers, but in a different way. And it troubles me deeply. From what I have seen over my four decades, I find the combination of the demise of the traditional pension plan (funded by employers, invested by professionals, most monitored by the PBGC, and mostly quarterbacked by qualified attorneys) along with the concurrent explosion of industry-led 401(k) plans that started in earnest in the mid to late 1980s, is placing too much of a burden, an unrealistic burden, on our country's workforce. The system provides no retirement comfort to the majority of Americans. It has consistently affronted my sense of equity that certain post-ERISA plan features, such as automatic enrollments as well as in current proposals, have been hailed by the retirement industry as successes, while to me everyone was avoiding or missing the boat. I instead have always been painfully aware that most employees barely have enough to get by month-by-month, even day-by-day, much less afford 401(k) contributions.

And so the idea that employees must reduce their pay to provide for their retirement is a great travesty, a slap in the face of most people who work hard. It is cruelly unrealistic to require employees to fund all or a good part of their retirement. And so no, I don't think the top-heavy, sections 401(a)(4) including gateway, 401(a)(26), 410(b), 414(q), etc. (collectively, nondiscrimination) rules do nearly enough for the vast majority of our population. Poor, often knocked down hard or for good (e.g., medical costs, student loans, limited or no opportunities, unprepared or uneducated, bad luck, down-sized, etc.) and perpetually stressed about paying bills for basic needs during their working years, and then continuing to be poor and struggling in their retirement years, notwithstanding persistent honest efforts to provide for themselves and families, is an unacceptable outcome. That is especially affronting when all the while and at the same time, many luckier individuals, generally speaking, literally have more money than they know what to do with it.

Requiring employees to fund their retirement is ridiculously harsh and unrealistic

Third Question: Can employees better recover their promised but unfulfilled benefits? Does ERISA, 48 years later, provide an effective redress for employees to gain the retirement and health plan promises made to them, when subsequently those

promises are not realized? Both in the pension and welfare plan arena, ERISA's causes of actions, remedies and the like have failed miserably in this regard.

For many formidable reasons, it still is nearly impossible for an employee protected by ERISA to enforce his or her rights to obtain the benefits that were promised and not provided. What follows are some of the reasons. Qualified ERISA attorneys by and large get paid hourly fees, not on a contingency fee basis that pays many or most plaintiffs' attorneys. This business practice of most ERISA lawyers means that as a general rule they are not available to take the cases of one or a few individuals. I believe that many contingency-based lawyers who are willing to take small plaintiffs' cases often don't possess adequate knowledge of ERISA to effectively fight an attorney who represents the defendants, which attorney often is an ERISA expert who gets paid an hourly fee. Most wronged individuals (often due to administrative or legal mistake but not always) cannot afford the hourly fees of an experienced ERISA lawyer to effectively fight for their rights. Indeed, a strategy I have seen is that the employer or other defendant tries to break the bank of the employee and plaintiff's attorney (who is fronting his/her/their time and sometimes expenses), bleeding them to death. Also, ERISA is so complex that some judges have a hard time figuring out (or have the time to figure out) whether to believe the plaintiff's or the defendant's painting of the law, or adequately understand ERISA law, especially when one side throws specious arguments to the court, hoping any one argument sticks. Nonsensical legal arguments, and worse when augmented by a twisted version of facts, make it terribly difficult and time-consumingly expensive for the lawyer to fight back. Furthermore, ERISA law is so obfuscating that many litigating attorneys (actually most every attorney of any kind) recognize the formidable and odd behemoth ERISA is, and stay clear of it.

ERISA and the legal system prevent equity

ERISA fails: Employees wrongfully denied benefits never win, with almost insignificant exceptions

The primary exception to ERISA's failure to make employees whole are the class action suits, where an employee just needs to be lucky enough to fall within the applicable facts. The most notable example of this is the litigation against employers, fiduciaries and others for putative high plan fees, expenses, and/or low returns. The business model of class-action ERISA lawyers (as I understand it) is that they bet the class will prevail or the parties reach a settlement, either of which will provide a large payoff for themselves. But class actions are a rare breed of cases, not helping all of the employees who have asked me, and I speculate other ERISA experts, over the years to aid them in their fight against their fiduciaries and employers. The employees then always ask for referrals they can afford and that I can recommend. I always come up empty.

Although I'm not a litigator and I do not directly represent employees, I took a case as ERISA counsel with litigation co-counsel 25 years ago. It involved an unfortunate young woman whose COBRA rights were violated, and then incurred unaffordable substantial hospital and medical bills. More recently I and litigation co-counsel represented about 35 employees whose retirement plan benefits were denied. These benefits were promised to them for many, many years. The employer told them, most all still employed, that it terminated the plan and no plan benefits were available to them, unless by chance they were. The owners cashed in, for their own use, the life insurance policies that had been held, but not in a trust, to fund the plan's retirement and death benefits of the employees. The owners kept for themselves the policies for their lives.

A wronged employee needs a miracle to receive promised benefits

The plan was a two-page document. It did not meet any single ERISA requirement. The defendants' defense was that the plan was a top-hat plan, in my opinion an absurd argument given that all of the participants, except for the few owners, were rank-and-file employees. This group could not arguably qualify anywhere close to any one of the criteria courts have used to define a top-hat plan. (Under ERISA, a "top-hat" plan is a certain type of plan for "a select group of management or highly compensated employees," neither of which were the rank-and-file employees. Due to this select group's status, a top-hat plan is excused from 99% of ERISA's rules.)

There were two federal district court cases, the first involving one employee and then immediately after, the second involving the larger group. The first court squashed the defendants' top-hat position. It held them as fiduciaries, one or more who had breached the fiduciary obligation under ERISA to pay the promised plan benefits. The second court held that the first case provided res judicata for the second lawsuit, that is, precedent basically for key points of law, yet the employer continued to fight to deny the employees' benefits. This second court ordered the defendants to create a qualified plan under ERISA to ensure benefits would be paid (of course, which "qualified plan" and ERISA-compliant plan were required from the get-go). Subsequently, when I learned that the defendants failed to comply with the court order, the litigation began anew with the same second court. The court then held that indeed the defendants failed to satisfy the court's first order and judgment, and that the employees' promised benefits needed to be paid.

Even in the most perfect case against fiduciaries, participants' obstacles are enormous

It subsequently took several additional years for the plaintiffs' attorneys to prevail to collect their fees of litigation (and even though the initial threshold test and the *Hummell* five-part test of awarding fees were easily satisfied). The issue of attorney fees ultimately went to the Ninth Circuit Court of Appeals, which court ordered the

district court to award the plaintiffs' attorneys fees (and none to the defendants' attorney).

The initial actions of the defendants in terminating the plan and denying plan benefits stunned me as did also when defendants continued to fight. It took 11 years of litigation for the employees to prevail and receive their unlawfully-denied benefits, but they did prevail!

The point of this, as well as the point if you were to read ERISA cases, is to demonstrate how horribly stacked ERISA litigation is against the employees. The likelihood of a win is almost always "never." In the case I describe above, I'm not sure any situation could have been clearer that defendants failed to comply with ERISA when they decided they were not paying anything to the employees. Yet it took 11 years of luck, significant risk and extremely hard work to obtain the employees' money.

Making matters worse for employees is the court-made, initially logical ERISA "exhaustion of administrative remedies" requirement. This rule mandates participants to engage and exhaust the plan's claims procedures before the court will hear the case. Many employees and their attorneys don't know this and for those who do, God help them. Merely correctly navigating this plan-required administrative rule without the benefit of a lawyer (even with one!) is often a herculean and frustrating, time-swallowing non-starter. And as stated previously, hiring an effective lawyer in the first instance is something extremely few participants can afford.

ERISA's claims procedures intended to help employees do not; EPCRS has

By itself that technical procedural rule is a legal sword defendants swing with abandon that smashingly prohibits a huge percentage of wronged participants claiming denied benefits, particularly with disability and health benefits, from even getting the courts to hear the merits of their claims.

Thank goodness most fiduciaries and plan providers want to do the right thing for employees, such that the vast majority of employees do obtain the plan benefits promised to them. But for those who aren't so lucky, the battle for the employee to gain justice is almost universally, entirely futile.

Having said that, it is interesting that aside from the successful plaintiff class action suits, it is the tax laws, specifically employers' fear of the draconian consequences of IRS "plan disqualification" or "Audit CAP," that has done good to restore plan benefits. EPCRS is one of the key post-ERISA-enactment developments that has made ERISA better in meeting its founding principles. That is because the employer's tax and litigation salvation from disqualification or other severe consequences rests

upon the golden rule of EPCRS. That principle is to make employees whole and put the plan and its participants in the place they would have been in if the plan had not experienced the IRS "disqualifying" mistake or mistakes.

The Employers' Perspective. Very summarily from the employers' point of view, in my opinion the magnitude, multitude, and never-ending revisions in the law have been an exceedingly heavy yoke for the employer to bear. The expenditure of time, money (including legal fees), resources, and energies merely to stay legally tax-and ERISA-compliant always warrants the question as to whether the gains provided for employees and employers by the law changes outweigh the losses, if you will, of compliance? We can do better without wasting so much in resources and patience that make these plans unduly burdensome for employers (especially small employers).

Employers' compliance with ERISA is too heavy a yoke

Because these plans cost so much and require such attention, the smaller employer often has no plan at all for the owners and their employees, as indicated above. The owners of many small companies might do well enough to employ people and live a more comfortable life than most Americans do, but they also struggle to the degree that they cannot afford a legally compliant plan for neither themselves nor their employees. No one has an adequate nest egg. Failing to provide a retirement plan for owners of smaller companies and their employees is another stark failure of ERISA in need of repair.

On the bright side for some employers and their top employees, the benefit limitations and the creativity allowed by the techniques we use (e.g., cross-testing, cash balance, 410(b), etc.) often still provide, in their totality, a great retirement and tax opportunity for handsomely paid owners of small and medium-sized profitable companies, including those owned by professionals, and also for higher-paid employees of larger companies. Even with the chilling, and/or prohibiting, constraints of Sections 414(b),(c),(m),(n) and (o) - which in my view no one can philosophically discredit, most wealthy or financially successful owners of companies (including professionals), and critical employees, still receive wonderful retirement benefits which cost them in most cases in terms of contributions for employees, next to almost nothing or nothing. What bothers me so much is not that the law allows owners and critical employees to receive generous retirement savings, but that rank-and-file employees in many cases still receive completely inadequate amounts for retirement and death benefits. This is what should change.

ERISA is no friend to smaller employers, with rare exceptions

Given the heavy, complex, and increased tax risk applicable to Section 409A plans, (legitimate) top-hat plans are still a powerful and effective tool to counter the Code limitations for a select group of higher-paid and management employees of larger

employers and of some medium-sized companies. However, top-hat plans almost never provide opportunities for most smaller employers, including professional employers, and their employees. Again, my beef is not with key employees receiving large benefits. It is with the shameful disregard of the vast majority of our population.

Summary. I believe that ERISA falls short of its objectives in certain key respects, terribly so. Greater coverage and increased benefits for regular rank-and-file employees, while not exacting pain for most of our employer and employee populations, is needed. Placing wronged employees on even footing to fight the bad actors is essential. And let's stop killing us with nonstop, burdensome, expensive changes in the law that do not provide meaningful solutions to what seems to be clear important shortcomings.

It Need Not Stay Depressing. My long career mostly has been to help employers and providers assisting employers with their plans. In this article I share several observations obvious to me and my opinions (right or wrong). I apologize if it is a downer, but there may be hope. I also recognize that one may argue that the glass is half full, to which I simply reply: half is not enough.

Except for a short, obsessing period of my career, I did not look for solutions to improve our country's retirement system. That was not my job. I know that many have done this work. I confidently believe a better retirement system can be built, both for the wealthy and regular employee, even if it does require greater awareness of most Americans, and then presumably a different mainstream belief system. I hope that a younger generation can establish a program that treats rank-and-file employees and small self-employed owner/employees, and other employers, with more dignity and at a lower cost than exists today.

Only a fundamentally changed mindset and law will matter

COVID-19 allowed us to clearly see that as a class the more privileged among us navigated these rough times much easier, and broadly speaking less tragically, than the less privileged were able to do. The disparity in struggles and outcomes was tangible for all to see. But as horrific as the pandemic has been, and how other events also revealed great disparities in different populations, I hope they may prod others with energy and commitment to transform our retirement and health systems into one that is more egalitarian, realistic, and less painful.

*[**Note**: Special thanks to Jeff Mandell, now a consultant to the law firm, for authoring this article to share his thoughts and ideas for the benefit of our firm and clients. The breadth and depth of his experience gathered over many years analyzing and advising employee benefit plans is invaluable to clients of the firm. – Jeffrey Johns, Esq.]*

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