

WEBINAR



Introduction to ERISA: Why It Matters

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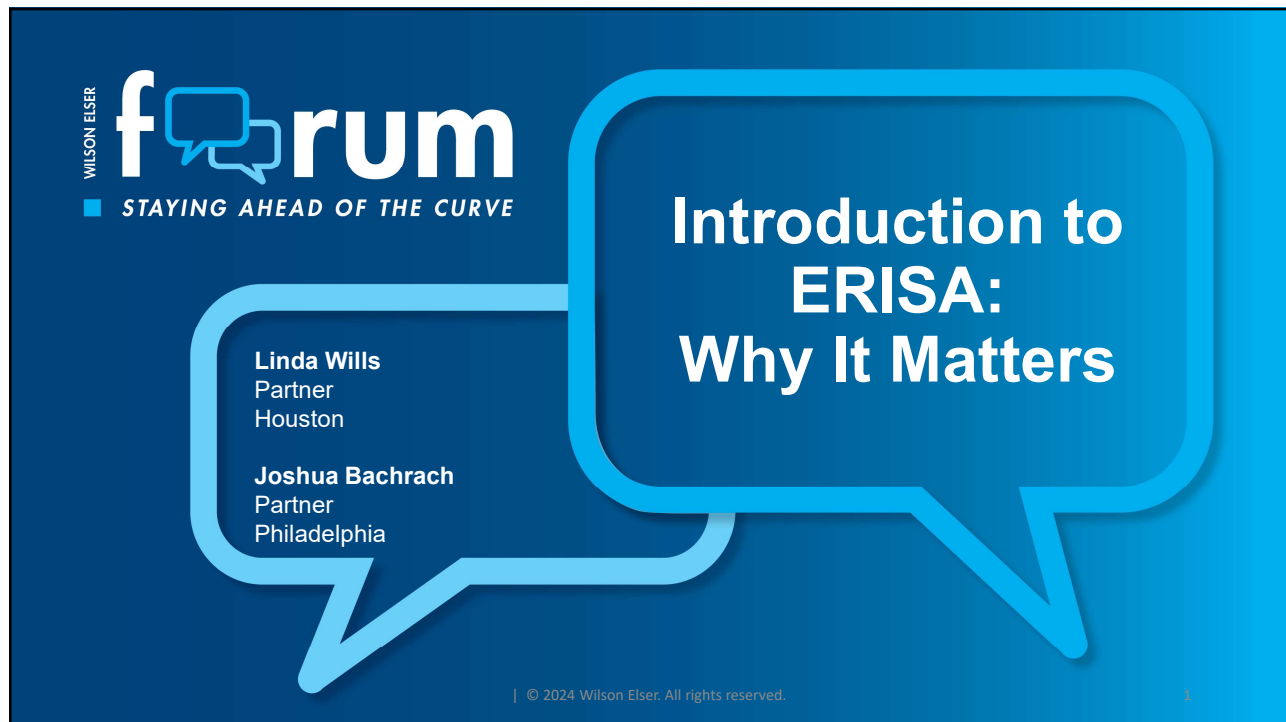
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■ STAYING AHEAD OF THE CURVE

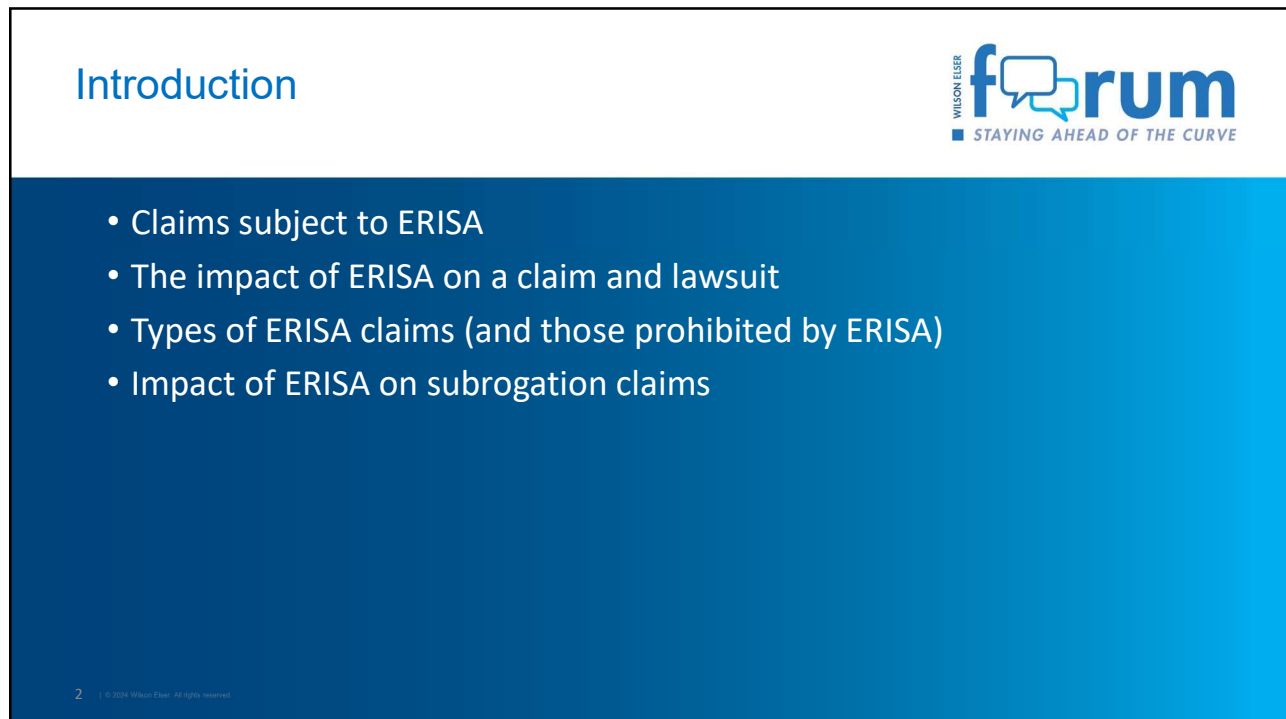
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**Introduction to
ERISA:
Why It Matters**

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Introduction

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■ STAYING AHEAD OF THE CURVE

- Claims subject to ERISA
- The impact of ERISA on a claim and lawsuit
- Types of ERISA claims (and those prohibited by ERISA)
- Impact of ERISA on subrogation claims

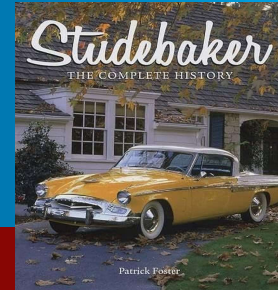
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History of ERISA



- Before ERISA –
 - No federal regulation
 - Few protections for participants



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MINUTES

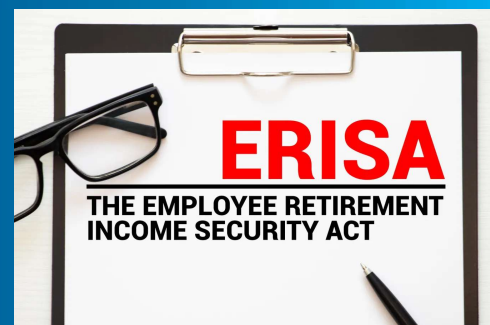
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The ERISA Statute



- Employee Retirement Income Security Act of 1974
 - Federal statute
- Applies to most employer-sponsored Pension/Retirement Plans and Welfare Benefit Plans
 - Welfare benefits include group health, life, AD&D, disability and similar plans



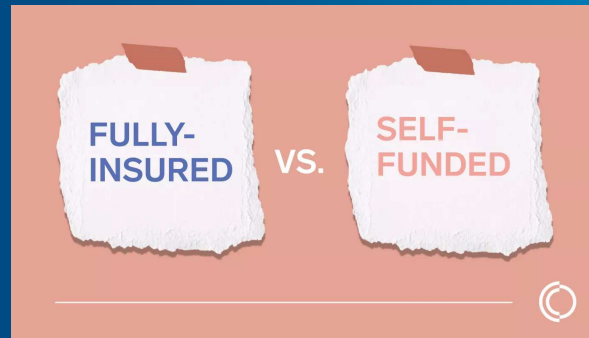
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The ERISA Statute



Applies to both self-funded and insured plans



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The Goals of ERISA



- To protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.



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The Goals of ERISA



- Make employee-benefit plans a matter of exclusive federal regulation
- Uniformity across states
- At the same time, Congress did not want to make regulation of plans so burdensome or costly that it would discourage employers from sponsoring them

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Is it an ERISA Plan?



- Establishing **or** Maintaining a plan
- If a plan was ever established or maintained as defined by the statute, ERISA will always apply
- Even a plan covering one employee can fall under ERISA



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Is it an ERISA Plan?



- Does ERISA apply if the employer did not intend to create an ERISA plan?
- Does ERISA apply if the employer does not comply with ERISA's notice and reporting requirements?



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Who Can Create an ERISA Plan?



- Plans created by employers and “employee organizations”
 - Employee organization means “any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees’ beneficiary association organized for the purpose in whole or in part, of establishing such a plan.”

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Employee Organizations Examples



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What Plans are Exempt from ERISA?



- Governmental plans – federal, state and political subdivisions
- Church plans and related entities
- Tribal Plans
- Plans providing benefits only to owners
- Multi Employer Trusts – maybe
- ERISA safe harbor regulation
- Payroll practices



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ERISA Preemption of State Laws



- One of the broadest preemption sections of any federal law
- Promotes uniformity
- Preemption generally applies to any state law that “relates to” an ERISA plan
- State laws do not apply
- State regulators have no power

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Self-Funded Plans



- Plans whose benefits are funded entirely by the employer, through employee contributions or both – i.e. not insured
- Preemption always applies to state laws that relate to a self-funded plan



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Preemption and Insured Plans



- The “savings clause” of ERISA preemption
- State laws that regulate insurance are typically saved from preemption
- However ...



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Preemption and Insured Plans



- “[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.”
 - Bad faith claims are preempted
 - Prompt pay statutes directed at insurers are preempted
 - Even state laws requiring reporting of claims and participants are preempted as conflicting with ERISA’s regulatory scheme



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ERISA Claim Regulations



- Describe in detail the timing and contents of decision letters
- Requires a claimant to appeal a denied claim
- Describes the rights of a claimant to review and comment on information before a final decision



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Failure to Follow Claim Regulations



For the claimant – if they fail to appeal when required, they may be barred from filing a lawsuit



For the decision-maker – a late decision or other violation may impact the standard of review (TBD) and evidence a court can consider

Consequences
Just Ahead

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ERISA Litigation



- Right to be in federal court
- No jury trial – case is decided by a judge
- Where can the lawsuit be brought?

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Types of Claims Under ERISA



- Benefits due under the terms of the plan/policy
- Breach of fiduciary duty/equitable relief
- Statutory penalties
- Fees and costs

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Claim for Benefits Due Under the Plan



- Standard of review
 - De novo or arbitrary and capricious
 - What's the difference?
 - States banning discretionary clauses
 - Was there a violation of the ERISA claim regulations?

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Claim for Benefits Due Under the Plan



- What evidence is considered?
 - Depends on the standard of review
 - Courts are limited to the claim record at the time of the final decision under the arbitrary and capricious standard
 - Courts are divided on the evidence that can be considered under de novo review
- Cases are decided by a judge, usually on a motion
 - Bench trials are rare, depending on where the lawsuit is filed and the standard of review



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Discovery in Benefit Lawsuits



- Depends on the standard of review
- “Conflict of interest” discovery under arbitrary and capricious review
- Under de novo review, if new evidence is allowed, some courts require good cause



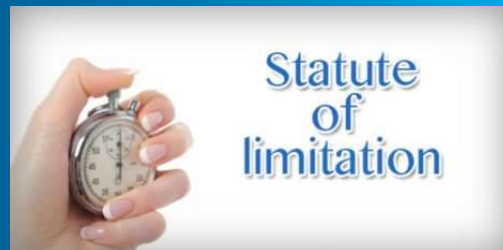
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Statute of Limitations on Benefit Claims



- Deadline for filing a lawsuit
- No SOL for benefit claims in the statute
- Follow most analogous state SOL – usually apply the SOL from the state where the policy was delivered
- Contractual limitations period
- Stated in insurance policy or plan document
- Can be shorter than SOL and applies if reasonable



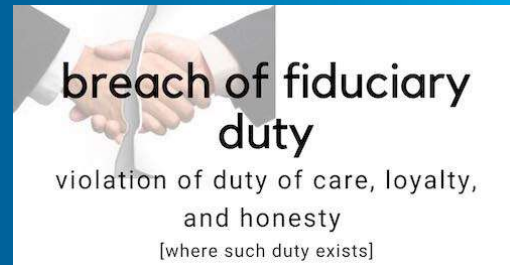
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Claims for Breach of Fiduciary Duty



- Involves claims for misrepresentation, failure to provide required notice or plan documents causing harm
- Does the defendant owe the duty?



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Relief for Breach of Fiduciary Duty



- Equitable relief only – i.e. not monetary damages
- Examples include:
 - Disgorgement of profits
 - Reformation of the plan terms
 - Declaration that the plaintiff is a plan participant
 - Surcharge???



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Lawsuits Involving Fiduciary Breach Claims



- No deference owed to the fiduciary
- Parties can conduct discovery and rely on expert witnesses
- If there are factual issues, court will conduct a bench trial with witnesses

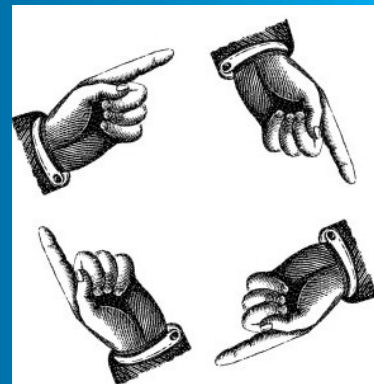
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Claims for Contribution and Indemnity



- Example: Employer is responsible for enrolling eligible employees. Beneficiary whose claim is denied only sues the plan insurer. Can the insurer make a claim against the employer for contribution and indemnity?
- It depends on the where the claim is brought



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Statutory Penalties



- A court may award a penalty of \$110 per day for failing to provide plan documents following a request
- Discretionary
- Can only be assessed against the Plan Administrator
- Applies to plan documents only, not requests for claim documents



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Fees and Costs of Action



Discretionary



Can be awarded to either side



Party seeking fees must achieve some degree of success on the merits of the claim



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Claims Involving Employers

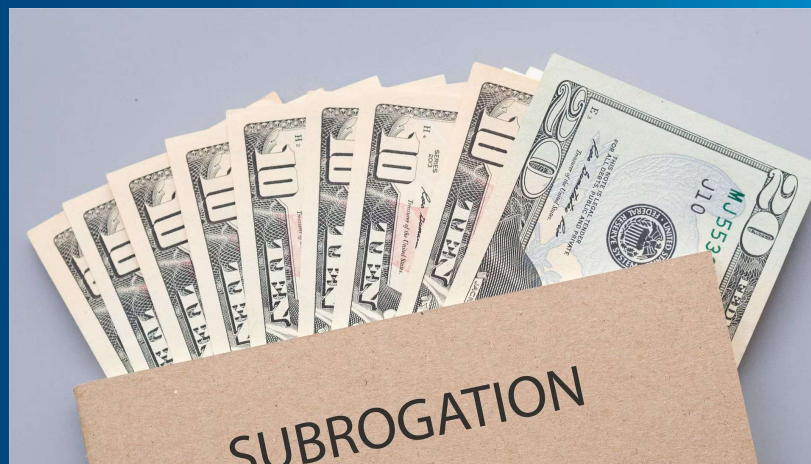


- Failure to properly enroll an employee
 - Evidence of insurability cases
 - Employee did not meet eligibility requirements
- Paying premiums when coverage ended under the terms of the group policy
- Misrepresenting to the insured the extent or amount of coverage
- Failure to provide notice when coverage ends
 - Failure to provide conversion notice
- Failing to provide plan documents

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Subrogation and ERISA



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Subrogation



“The right of an insurer to pursue the party that caused the loss to the insured and recover funds paid in the claim”

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Subrogation



- Most Health Plans include a subrogation right against the responsible third-party
- More disability policies are also including subrogation rights

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Subrogation



SO **WHY** DOES ANY OF
THIS **MATTER?!**

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Subrogation



It matters if you are
the one with the
subrogation right

It also matters you are
trying to settle a third-
party lawsuit and you
receive a lien letter

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Is it in the Policy/Plan Document?



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Subrogation



- ERISA is built on the language in the plan
 - If there is no subrogation language in the plan, there is no right
- What happens if there is a state anti-subrogation law?
 - It depends

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ERISA: Self-funded



- ERISA preempts all state laws that regulate self-funded plans – this includes state anti-subrogation law



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Subrogation and Insured Plans



- It depends on the type of law
- If the law is directed only against insurers, it is saved from preemption and an anti-subrogation law will be enforced
- If it is a law of general application (i.e. not limited to insurers), it is preempted

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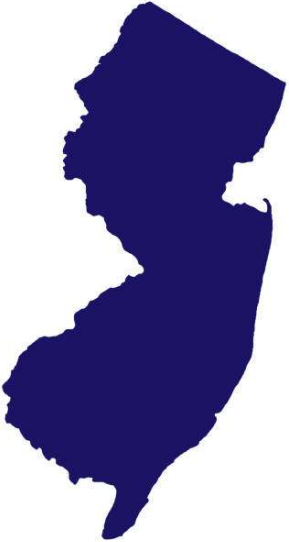
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New Jersey

- New Jersey statute applies to "any civil action" and funds from "any other source"
- To avoid ERISA preemption a state law must be "specifically directed" toward the insurance industry. The New Jersey statute is not. Because the New Jersey statute could be applied to any contributor in any civil action, it is merely a statute that has a significant impact on the insurance industry.
- The NJ law is preempted and there is a right of subrogation



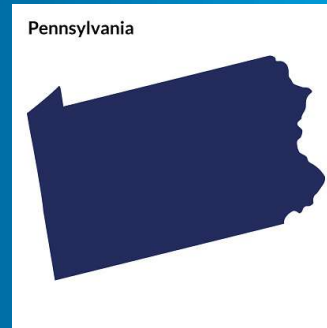
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Pennsylvania



- PA's anti-subrogation provision is in the MVFRL and the Supreme Court has held that this law "regulates insurance"
- Because the law regulates insurance, it is saved from preemption and the state law applies



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A Few More Points



- The make whole doctrine
- Strict tracing of funds



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THANK YOU!



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