NEWS

# The Successful Yet Much-Litigated ERISA Turns 50

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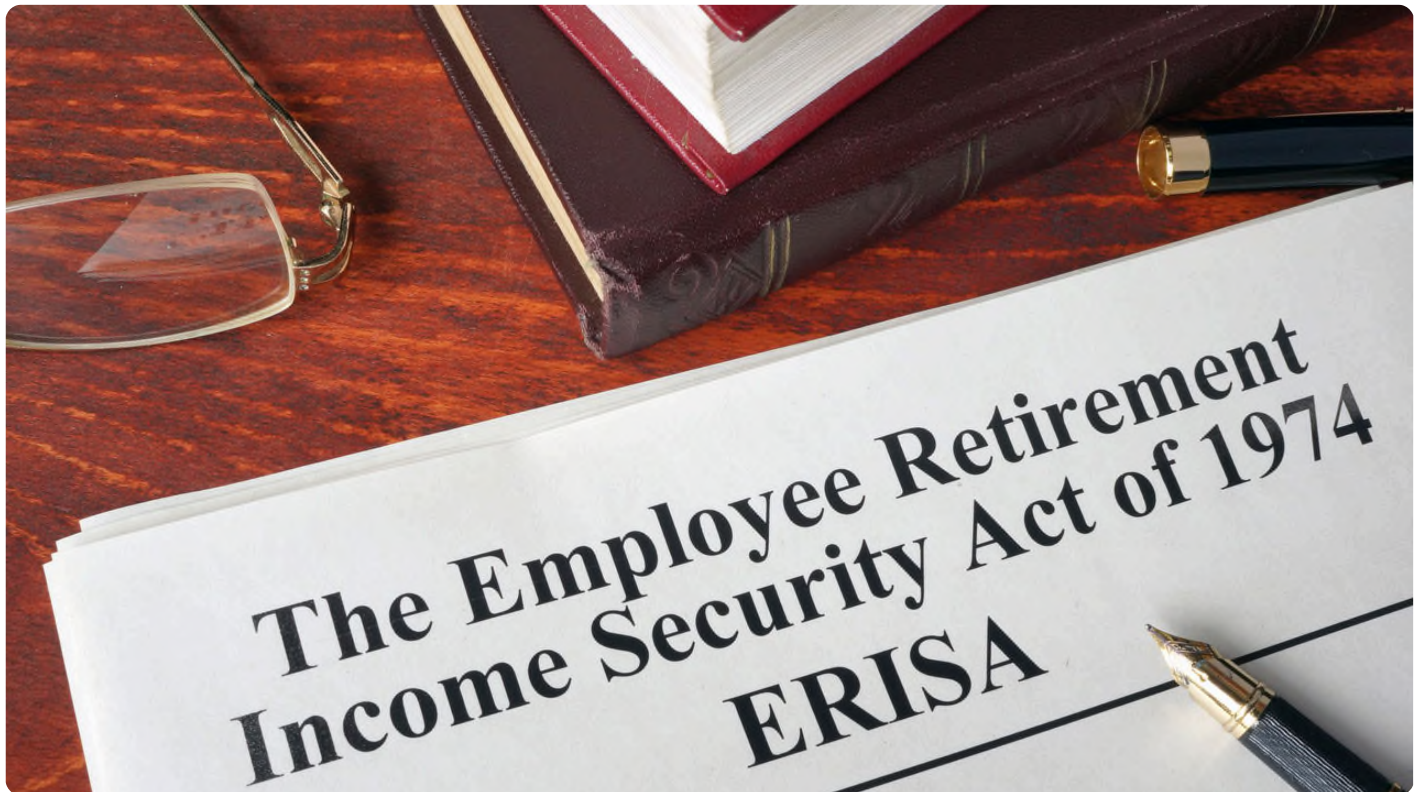


On Labor Day 50 years ago, President Gerald Ford signed the Employee Retirement Income Security Act (ERISA) into law. ERISA, a long time in the making, has had notable successes—but also has led to much litigation and perhaps even contributed to the decline of pension plans.

Congress drafted and revised the law after Studebaker closed its plant in South Bend, Ind., in 1963 and left many employees without the pensions they had been promised.

ERISA has "accomplished much of what it set out to do," said Lou Mazawey, an attorney with Groom Law Group in Washington, D.C.

"Without ERISA, there would be far fewer workers with retirement savings and far fewer workers with robust health insurance," said Juliana Reno, an attorney with Venable in New York City.

However, ERISA also has become a weapon for plaintiffs' attorneys to wield against retirement plan administrators and others in court.

"We have seen in the past 10 years an explosion of litigation challenging the fees and investments associated with 401(k) and 403(b) plans, and that is showing no signs of letting up," said Will Delany,

an attorney with Groom Law Group in Washington, D.C.

## ERISA and 401(k) Plans

ERISA's complicated rules were meant to protect pensions but may have inadvertently contributed to their demise, as 401(k) plans are less onerous for employers and nimbler for employees, said Diane Dygert, an attorney with Seyfarth in Chicago.

Reno agreed. "Technically, 401(k) plans came about due to changes in the tax code, not ERISA, but in my view, the growth would not have been as robust without ERISA pre-emption," she said.

There have been some attempts to chip away at ERISA pre-emption—attempts that SHRM has long opposed, as pre-emption helps plan administrators have uniform compliance obligations, rather than a patchwork of requirements.

ERISA has gradually resulted in the decline of defined benefit plans due to challenging minimum funding requirements, costly Pension Benefit Guaranty Corp. (PBGC) premiums, and a "flood" of regulations, Mazawey explained.

Accordingly, most participants covered by private retirement plans are in defined contribution plans, such as 401(k)s, where they must take responsibility for investment of their accounts, and for continuing to make contributions versus other forms of saving, he added.

## ERISA's Broad Reach

ERISA was not limited to retirement plans when it became law in 1974, Dygert said.

Employer health and welfare benefit plans—and even severance programs—also are subject to ERISA's oversight, she noted.

"Granted, it has been the last couple of decades that the regulations around welfare plans have caused even a ripple," Dygert added. "But that ripple resulted in a tidal wave culminating in the Affordable Care Act's [ACA's] amendment of ERISA in 2010."

The ACA has had a major influence on how employers design and price their medical plan offerings, she said. That influence has included the coverage of preventive services, the coverage of dependents through age 26, and compliance with the employer mandate.

Other amendments to ERISA—such as COBRA and the Health Insurance Portability and Accountability Act—also have had far-reaching impacts.

## Successful Track Record

ERISA has succeeded in addressing several concerns, according to Mazawey, including:

- The pension insurance system, as administered through the PBGC, protects the pensions of the vast majority of workers covered by private defined benefit plans.
- ERISA's fiduciary standards and prohibited transaction rules have dramatically improved the management of private pension plans.
- The law's robust reporting and disclosure requirements have given participants access to substantial information, though some experts have raised questions about how much participants understand and use that information, Mazawey said.

## Claims of Breach of Fiduciary Duty

ERISA also has been the source of much litigation.

"Plan administrators' potential greatest liabilities typically stem from their fiduciary responsibilities [under ERISA]," Dygert said.

Breach-of-fiduciary-duty claims involve allegations that plan fiduciaries did not act in the best interests of the participants. This can include failing to prudently select and monitor investment options, not diversifying plan assets, or engaging in conflicts of interest, she said.

"Under ERISA, fiduciaries must act solely in the interest of plan participants and beneficiaries, with a duty of prudence and loyalty," Dygert explained. "If they fail in these duties, they can be held personally liable for any losses to the plan."

Plan administrators have seen lawsuits challenging nearly all aspects of fiduciary decision-making, said Deborah Davidson, an attorney with Morgan Lewis in Chicago.

"This has created a frustrating dynamic for plan fiduciaries," she said. "ERISA's prudence standard is process-oriented, but many fiduciaries who implement careful and detailed practices for managing their plans still have to defend these lawsuits because a particular plaintiff would have made a different decision."

## Other Litigation Theories

Other established ERISA litigation theories include:

- **Excessive fee cases.** Plan participants allege that the fees charged by the retirement plans, particularly 401(k) plans, are excessive and not in the best interest of the participants, Dygert said. "These cases often focus on the costs of investment options and administrative services," she said. The plaintiffs typically argue that plan fiduciaries failed to ensure the fees paid were reasonable, leading to diminished retirement savings for participants.
- **Improper denial of benefits.** Plan participants may claim that their benefits were improperly denied or reduced. "These claims can involve disputes over plan terms, interpretation, or errors in plan administration," Dygert said.

- **Failure to provide required disclosures.** ERISA mandates specific disclosures to plan participants, such as COBRA notices, summary plan descriptions, and fee disclosures. Claims under the law can arise if these disclosures are not provided or are misleading, she noted.

## Liability

For certain types of reporting and disclosure violations, ERISA specifies that the plan administrator is the responsible party, said Marcia Wagner, an attorney with The Wagner Law Group in Boston.

Plan committees are a frequent target of breach-of-fiduciary-duty claims, and the board of directors also could be liable for a failure to monitor, she said.

“Defendants in ERISA litigation are not limited to plan administrators, plan sponsors, and other plan fiduciaries, such as investment committees,” Wagner said. “Investment managers and investment consultants may be listed as defendants. For certain types of claims, such as cybersecurity breaches, the law is presently unclear as to which party bears legal responsibility.”