

# The Benefits Brief

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## LEGISLATIVE ALERT

### The Pending Patients' Bill of Rights Legislation: More Litigation for Employers

The House of Representatives and the Senate have passed separate bills including provisions intended to provide new protections for patients in managed care health care plans. The House bill (H.R. 2990) and the Senate bill (S. 1344) currently are being discussed in conference committee and

conference legislation is expected to be released within the next few weeks.

The House bill includes several far-ranging changes which significantly differ from the Senate bill. The most controversial difference is *provisions in the House bill that expand the liability of HMOs, insurers, other managed care providers --- and, in some cases, employers --- in connection with medical coverage claims*. The Senate bill does not contain any similar liability provisions.

### The House Bill: New Remedies Mean More Lawsuits

The expanded liability provisions of the House bill generally provide the following:

- Amends the state law preemption provisions of the Employee Retirement Income Security Act to all state causes of action to recover damages (i) resulting from personal injury or wrongful death against "any person in connection with" the provision of insurance, administrative services or medical services or (ii) that arises out of the arrangement for such services.
- Permits punitive damages with a narrow exception for cases where all of the requirements of the bill's external appeals requirements are satisfied.
- Provides that employers or other plan sponsors maintaining a group health plan are subject to liability if (i) they exercise any "discretionary authority" to make a decision on a claim for benefits and (ii) the exercise of such authority resulted in personal injury or wrongful death.

Although the House bill contains provisions that are intended to limit employers' exposure to liability, exceptions to such limitations effectively undercut their scope, so that it is *wishful thinking to believe that these provisions are sufficient to insulate employers from litigation*.

For example, the House bill does not define what constitutes an exercise of "discretionary authority" by an employer with respect to a claim/ appeal decision, although the bill lists three activities that do not constitute an exercise of discretion. Thus, the bill leaves the definition of what activities will constitute an exercise of discretionary authority to be determined in litigation. Unless and until litigation establishes a clear idea of what these activities will be, a plaintiff's attorney simply must allege that the employer exercised discretionary authority and seek extensive and often expensive evidence discovery from the employer. Further, unless the courts develop a consistent definition, an employer cannot be sure that a court will dismiss the claims on summary judgment thereby exposing the employer to the risks and expense of litigating the case before a jury.

## What Does the House Bill Mean for the Business Community?

The liability provisions of the House bill have the potential to significantly increase the expense to employers of maintaining a group health plan. In particular, the most significant flaw in the House bill is that the uncapped liability provisions add every incentive to plaintiff's attorneys to include the employer in the lawsuit. Although the employer protection provisions may be sufficient for an employer ultimately to prevail in a lawsuit involving a claim/appeal decision, the cost of such litigation may result in an expensive pyrrhic victory.

## What Should Employers Do?

Employers should immediately contact their Congressmen to express their opposition to H.R. 2990. Prevention measures in Congress will help limit the ever expanding field of litigation in the workplace - - in this case benefits litigation. *If you have any questions, please feel free to contact Bruce H. Schwartz, Steven D. Baderian or Michael D. Jacobster at (914) 328-0404.*

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## Save the Date

### Keeping Pace in the Changing Workplace 2000 Symposium

June 9, 2000 - White Plains, New York

October 19, 2000 - Fairfield, New Jersey

November 3, 2000 - Waltham, Massachusetts

November 10, 2000 - New York, New York

### Society for Human Resource Management 52nd Annual Conference & Exposition

June 25- 28, 2000 - Las Vegas, Nevada

### 12th Annual Corporate Counsel Conference October 26-28, 2000 - Palm Springs, California

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