

## INSURANCE AND REINSURANCE

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*Lisa Bondurant and Brittany Crosby analyze potential international applications of ERISA and other international issues multinational employers should consider within the ERISA context.*

## ERISA Abroad?

### ABOUT THE AUTHORS



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### ABOUT THE COMMITTEE

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The Employee Retirement Income Security Act of 1974 (“ERISA”) is a federal law which governs most employer-sponsored pension, health and other benefits plans. The statute does not require employers to provide such benefits, but imposes a minimum standard if the employer voluntarily elects to do so. More specifically, the ERISA statute creates comprehensive rules for plan participation, benefit accrual, funding, and vesting. Additionally, ERISA plan administrators must adhere to certain fiduciary duties. Finally, the statute also includes various procedural rules for ERISA related litigation.

#### **Potential International Applications of ERISA**

As the world becomes more global, many employers may choose to open additional offices outside of the United States. A multinational employer may choose to provide a benefits plan for its international employees. Or, alternatively, a multinational employer may choose to provide a benefits plan to its American employees temporarily working abroad. In both situations, an important consideration is whether the employer-sponsored benefits plan abroad will be subject to ERISA regulations. This is an important question for employees, as well, as they count on these benefits to protect themselves and their families.

In general, an American law will not apply extraterritorially unless Congress clearly expressed an intent otherwise.<sup>1</sup> Notably, the language of the ERISA statute only excludes from its jurisdiction one specific extraterritorial application: if the plan is “established and maintained outside of the United States primarily for the benefit of individuals substantially all of whom are nonresident aliens.”<sup>2</sup> Accordingly, as long as the international plan is not maintained primarily for the benefit of nonresident aliens, ERISA regulations can apply outside of the United States. Although the U.S. Department of Labor (“DOL”) has not created a bright-line test to determine whether an international benefits plan is exempt from ERISA regulations, DOL advisory opinions generally consider: (1) whether the employer is located outside of the US, (2) whether the plan assets are maintained outside of the US, (3) whether the governing plan document was issued by a company domiciled outside of the US and (4) the percentage of nonresident aliens who benefit from the plan.

Other potential international applications of ERISA are instances where an American ERISA plan provider is affiliated with a foreign corporation. The ERISA statute creates joint and several liability for “trades or businesses (whether or not incorporated) which are under common control” in some cases.<sup>3</sup> Accordingly, some plaintiffs have attempted to sue affiliated foreign

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<sup>1</sup> See *Gilles v. Snyder*, 2000 U.S. Dist. LEXIS 13818, \*6-7, 2000 WL 1368024 (E.D. Pa. 2000).

<sup>2</sup> 29 U.S.C. § 1321(b)(7).

<sup>3</sup> 29 U.S.C.S. § 1301(b)(1).

companies for damages relating to the American company's ERISA violations.<sup>4</sup> This approach may be especially likely if the American company is insolvent.

### Procedural Considerations

First, even if ERISA is applicable to the benefits plan at issue, a plaintiff must still establish that the forum court possesses personal jurisdiction over the defendant. An American plaintiff bringing suit against a foreign company affiliated with her American employer will likely not meet the personal jurisdiction requirements, unless the foreign company has other contacts with the United States.<sup>5</sup> Within the context of ERISA litigation, a foreign defendant need only satisfy minimum contacts with the United States, rather than the specific forum state at issue.<sup>6</sup>

A second consideration is the proper venue and method of service for an ERISA action. The statute provides that venue is proper "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found."<sup>7</sup> Additionally, "process may be served in any

other district where a defendant resides or may be found."<sup>8</sup>

The final consideration is the applicable body of law for an ERISA action. Federal law generally preempts related state law in ERISA cases.<sup>9</sup> Any state law claims which are not preempted by federal law will apply the law which governs the master policy.<sup>10</sup> This will usually be the state of the employer's principal place of business, rather than the employee's domicile.<sup>11</sup>

### Strategic Considerations

First, because there is no bright-line rule to determine when ERISA can apply abroad, multinational employers should consider adhering to the requirements of ERISA even in relation to employees who are not located in the United States. Employers should be careful not to over-state the applicability of ERISA, however, if there is uncertainty.

Second, because an employer's benefits plan may be used in multiple countries, including a choice-of-law provision in master plan documents may help alleviate any uncertainty as to whether ERISA, or any particular state laws, will apply to future litigation.

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<sup>4</sup> See, e.g. *GCIU-Employer Ret. Fund v. Goldfarb Corp.*, 565 F.3d 1018 (where an American multiemployer pension plan brought a claim against a Canadian company by virtue of its relationship as the parent corporation of the plan provider).

<sup>5</sup> See, e.g. *GCIU-Employer Ret.*, 565 F.3d at 1026 (ultimately dismissing the plaintiff's claim for lack of personal jurisdiction).

<sup>6</sup> *Williams v. Ass'n De Prevoyance Interentreprises*, No. CIV.A. 11-1664, 2012 WL 1752687, at \*3 (E.D. La. May 16, 2012).

<sup>7</sup> 29 U.S.C. § 1132(e)(2).

<sup>8</sup> *Id.*

<sup>9</sup> 29 U.S.C.S. § 1144 (e).

<sup>10</sup> 5-15 *The Law of Life and Health Insurance* § 15.04 (2017) (quoting Restatement (Second) of Conflict of Laws).

<sup>11</sup> *Id.*

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