



[Understanding ERISA](#)

The Association of American Physicians and Surgeons (AAPS) published [an interesting article](#) on Governor Jan Brewer's (R-AZ) veto of several measures intended to stem ObamaCare in Arizona.

It is a fine article with one exception: It mentions ERISA in passing and repeats a very common misperception. The article says:

About 60% to 70% of employers have more than 100 employees and thus fall under ERISA. Freed of state mandates, they can buy their insurance in any state that gives the best price and the best packages of benefits. The rest of us—individuals and small businesses—are chained to the insurance companies and mandates in our respective states of residence, and tied to whatever deals that these companies cut with the state government.

I hate to single out AAPS, because this perception is widely held by all kinds of people. But it is wrong.

The fact is that EVERY employer (except government and church plans) falls under ERISA. It has nothing to do with the size of the group. ERISA says that states cannot regulate ANY employer health plan. What states CAN regulate is insurance companies. Some employers self-fund their benefits and others buy their coverage from a regulated insurance company. The ones that buy from insurance companies are indirectly affected by the regulations that apply to those insurance companies. Many large employers still buy fully-insured coverage, so they too are subject to the mandates, and other regulations, that apply to the insurers.

Back in 2000, I wrote a [paper](#) for the Cato Institute that explains a lot of this. At the time it was widely believed that ERISA prevented people from suing HMOs for denying legitimate services. That wasn't true, either, even though the proposed Patients' Bill of Rights legislation was predicated on it.

Again, I don't fault AAPS for misunderstanding this. ERISA is probably the least understood and most litigated law even enacted – at least up until now. If it stands, ObamaCare will cause ten times as much confusion and litigation. Indeed, ObamaCare will compound all the problems of ERISA. Employers will still be exempt from any and

all state regulation. But now insurance companies will be subject to dual regulation from both the states and the Feds.

I wonder if the Supreme Court will have time for anything else.

May 06, 2011 | [Leave a Comment](#) | by [Greg Scandlen](#)