# PUBLICATION

## Are Discretionary Clauses in Employee Welfare Benefit Plans Prohibited in Kentucky?

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**The Employee Retirement Income Security Act ("ERISA") is a federal law that sets minimum standards for most group employee benefit plans and pension plans in the private industry. ERISA requires plans to establish a grievance and appeals process for participants to obtain benefits from the plan and gives participants the right to sue for wrongful denial of benefits under the terms of the plan.**

One unique aspect of ERISA is that it also allows plans to determine the judicial standard of review for benefit denials, which is often critical in ERISA litigation. The scope of judicial review for denial of benefits turns on whether the claim administrator is given discretion under the plan to determine eligibility for benefits or to construe the terms of the plan. *Miller v. Metro. Life Ins. Co.,* 925 F.2d 979, 983 (6th Cir. 1991). If so, the court must apply an arbitrary and capricious standard in reviewing the administrator's decision. *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989); *Perez v. Aetna Life Ins. Co.,* 150 F.3d 550, 555 (6th Cir. 1998). Under the arbitrary and capricious standard of review, an administrator's decision "must be upheld if it is the result of a deliberate principled reasoning process, and if it is supported by substantial evidence." *Baker v. United Mine Workers of Am. Health & Ret. Fund,* 929 F.2d 1140, 1144 (6th Cir. 1991). If it is "possible to offer a reasoned explanation, based on the evidence" for the denial of benefits, and if the decision was based "on a reasonable interpretation of the plan," the decision is not arbitrary and capricious. *Shelby Cnty. Health Care Corp. v. Southern Council of Indus. Workers,* 203 F.3d 926, 933 (6th Cir. 2000); *Davis v. Kentucky Fin. Cos. Ret. Plan,* 887 F.2d 689, 693 (6th Cir. 1989), *cert. denied,* 495 U.S. 905 (1990).

In the last several years, participants in group employee welfare benefit plans have begun attacking the judicial standard of review in the context of Employee Retirement Income Security Act ("ERISA") § 502(e) claims, arguing that the Kentucky Department of Insurance no longer permits discretionary clauses in insurance policies. Participants rely on Advisory Opinion 2010-01 from the Kentucky Department of Insurance and Kentucky Revised Statute § 304.14–120. In pertinent part, Advisory Opinion 2010-01 provides "[i]t is the Department's position that discretionary clauses deceptively affect the risk purported to be assumed in any policy and as such, any forms containing discretionary clauses may be disapproved." Kentucky Revised Statute § 304.14–120 requires an insurer to file its policy with Kentucky's Insurance Commissioner.

Both the Sixth Circuit Court of Appeals and the United States District Court for the Western District of Kentucky have addressed the impact of Advisory Opinion 2010-01 and Kentucky Revised Statute § 304.14–120 on the standard of review in the context of ERISA claims. Most recently, the Sixth Circuit Court of Appeals found that the standard of review was not altered by Kentucky Revised Statute § 304.14–120, and it was not bound by Advisory Opinion 2010-01 "due to the mere possibility that the Department of Insurance could have disallowed the policy." *Hogan v. Life Ins. Co. of N. Am.*, 2013 WL 1316542, at * 5 (6th Cir. Apr. 3, 2013). The Court also noted that the participant "should not be able to have her cake and eat it too—either the policy is valid or it is not. She cannot seek the benefits contained in the policy while rejecting procedural language adverse to her." *Id*. This holding reaffirmed the Court's prior finding that Advisory Opinion 2010-01 "does not expressly prohibit the use of discretionary clauses, but rather provides guidance as to how such clauses will be reviewed." *Moss v. UNUM Life Ins. Co.*, 2012 WL 3553497, at * 13 (6th Cir. Aug. 17, 2012).

What does this mean for employers and plan administrators? The clear language in these cases should thwart future claimants from attacking the judicial standard of review. Employers and/or plan administrators, however, should continue filing their insurance policies with Kentucky's Insurance Commissioner in order to comply with Kentucky Revised Statute § 304.14–120. They should also maintain records of their filing in a readily accessible place so that they can produce this documentation to their counsel at the advent of any litigation related to the policy. Employers and plan administrators should also keep apprised of Kentucky's insurance laws to ensure that Kentucky does not ban discretionary clauses in the future as other states have done.