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MENTAL HEALTH MATTERS ACT, NOT JUST MENTAL HEALTH

Ethan Krantz

The Mental Health Matters Act, HR 7780, passed the House on September 29, 2022, by a vote of 220–205.¹ The proposed resolution, currently awaiting a vote in the Senate, authorizes funding for the development of curricula that improve mental health for children,² relaxes requirements for required documentation of disabilities,³ and allocates funding to research workplace stress across all industries in the wake of COVID-19.⁴ These provisions characterize bipartisan support to expand mental health resources and services for students and professionals.⁵

Included in the legislation, however, is a modification in a different area of law: the Employee Retirement Income Security Act of 1974 (“ERISA”).⁶ ERISA is a far reaching federal law that sets requirements for retirement and health care plans.⁷ ERISA does not require employers to provide health benefit⁸ or retirement plans but makes certain minimum substantive requirements for employers who choose to create ERISA qualified plans.⁹ For example, it requires the entities running these plans to act as fiduciaries for the participants.¹⁰ The fiduciary requirement imposes a duty to avoid conflicts of interest and act prudently.¹¹ The Mental Health Matters Act changes

¹ Text - H.R.7780 - 117th Congress (2021-2022): Mental Health Matters Act, H.R.7780, 117th Cong. (2022), [<https://perma.cc/WKQ2-9TNK>]

² Mental Health Matters Act, H.R. 7780, 117th Cong. § 102 (2008).

³ *Id.* at §503.

⁴ *Id.* at §901.

⁵ The Mental Health Matters Act passes the U.S. House, National Association of Social Workers (Oct 05, 2022) [<https://perma.cc/PB9R-M8TY>]

⁶ Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 and in scattered sections of 5, 18, and 26 U.S.C.).

⁷ ERISA, U.S. Department of Labor, <https://www.dol.gov/general/topic/health-plans/erisa>, [<https://perma.cc/296F-BRRU>]

⁸ See, Edward A. Zelinsky, *Golden Gate III, ERISA Preemption, and the San Francisco Health Care Security Ordinance*, Working Paper No. 261, 14, (April 2009) [<https://perma.cc/75Q3-XTYA>].

⁹ ERISA, *supra*, note 9.

¹⁰ *Id.* It also requires plan providers to make plan information readily available.

¹¹ *Id.*

ERISA because it deems certain pre-dispute arbitration provisions unenforceable and imposes restrictions on post-dispute arbitration provisions.¹² A pre-dispute provision is negotiated as part of the employment contract and preemptively requires arbitration, whereas a post dispute provision is an agreement to go to arbitration over a specific claim that arises.¹³

While the Supreme Court has not addressed these clauses in an ERISA case, most circuit courts have concluded that they are enforceable.¹⁴ Nevertheless, courts have prevented some substantive claims from going to arbitration.¹⁵ The issue is more complicated in state law; some states have statutes prohibiting arbitration of insurance disputes that might conflict with the Federal Arbitration Act.¹⁶ The proposed legislation seeks to dramatically change the process for ERISA disputes for those with arbitration clauses.¹⁷ It also preempts agreements that attempt to waive *de novo* review of benefits disputes.¹⁸ Following a number of states, it proposes to end discretionary authority of “benefit determinations or interpretation of plan language.”¹⁹ In relation to mental health, this provision attempts to make it easier for a policyholder or a class of policyholders to dispute a denial of coverage.²⁰ The Ninth Circuit in *Wit* reversed the District Court order that

¹² Mental Health Matters Act, H.R. 7780, 117th Cong. § 702 [rendering pre-dispute clauses unenforceable and requiring claimants for post dispute agreements to affirm they were not coerced].

¹³ *A Predispute Arbitration Clause – Arbitration Agreement Explained*, ADR TIMES, (March 17, 2021) [<https://perma.cc/PNQ4-8699>]

¹⁴ Kate Watson Moss, *ERISA and Arbitration: How Safe Is Your 401(k)?*, 64 DePaul L. Rev. 773, 783 (2015). The Supreme Court has recognized the Federal Arbitration Act as a “federal policy favoring arbitration.”

¹⁵ *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021) (Sullivan, J., dissenting) [Claims for breach of fiduciary duty by investment manager are not “related to employment”].

¹⁶ Mark J. Bunim, *When States Prohibit Dispute Resolution: The Use of Mandatory Arbitration Clauses in Insurance Policies*, 71 Disp. Resol. J., 47, 48 (2016).

¹⁷ Mental Health Matters Act, H.R. 7780, 117th Cong. § 702(d-e) [The proposed legislation says that questions of arbitrability go to the courts not arbitration]. See, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

¹⁸ Mental Health Matters Act, H.R. 7780, 117th Cong. § 702(e).

¹⁹ Mental Health Matters Act, H.R. 7780, 117th Cong. § 702(e). See Kristina N. Holmstrom, *A Deep Dive into State Discretionary Bans, plus De Novo Review* p. 7 [<https://perma.cc/ETJ5-44SC>].

²⁰ See, *Wit v. United Behav. Health*, No. 20-17363, 2022 WL 850647 (9th Cir. Mar. 22, 2022) [“Because the Plans in this case confer UBH with discretionary authority to interpret the terms of the Plans, we ‘review the plan administrator’s decisions for an abuse of discretion’”].

required United Behavioral Health to reprocess over 67,000 claims.²¹ The Ninth Circuit concluded that UBH's denial of coverage for mental health and substance use disorder treatment coverage was not unreasonable despite the procedures being within the standard of care.²² Restricting discretionary power may prevent these disputes from occurring in the future.

The U.S. Chamber of Commerce, a large lobbying group, urged members of Congress to vote against the legislation.²³ The group criticized this part of the legislation, claiming arbitration is often cheaper by citing research suggesting that claimants have a higher likelihood of success in arbitration.²⁴ The lobby group cited a study funded by itself.²⁵ The research cited is not focused on mandatory arbitration which is the most dramatic portion of the legislation. The two parties can still agree to go to arbitration post dispute.²⁶

The Chamber of Commerce is correct that deeming pre-dispute agreements unenforceable may infringe on general contracting rights and increase policy costs because potential litigation costs would be priced into policy terms. The legislation is a strong effort to level the slanted playing field, as employees often do not expect disputes over benefits. Furthermore, placing barriers to post dispute arbitration ensures that people are not being coerced into unfamiliar, extrajudicial processes. The Bill is expected to be awfully close in the Senate, so only time will tell.²⁷

²¹ *Id.*

²² *Id.*

²³ U.S. Chamber Letter on H.R. 7780, the "Mental Health Matters Act" (Sept. 29, 2022) [<https://perma.cc/9X5Z-R8B5>]

²⁴ *Id.*

²⁵ Nam D. Pham and Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration*, 3, (March 2022), ndp analytics, [<https://perma.cc/5H36-9BQG>]

²⁶ For another earlier study, see Alexander J.S. Colvin and Mark D. Gough, *Comparing Mandatory Arbitration and Litigation: Access, Process, and Outcomes* 22 (April 2, 2014) [litigation higher win rate and amount won.] [<https://perma.cc/PK8G-XN3A>].

²⁷ House Passes Mental Health Matters Act: What Employers, Insurers, And ERISA Plan Administrators Need To Know, Morgan Lewis (October 06, 2022) [<https://perma.cc/3G9J-F7A6>].