

111TH CONGRESS  
1ST SESSION

# H. R. 3925

To amend the Employee Retirement Income Security Act of 1974 to preclude preemption of a State cause of action relating to a denial of a claim for benefits under a health care plan.

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## IN THE HOUSE OF REPRESENTATIVES

OCTOBER 26, 2009

Mr. McDERMOTT introduced the following bill; which was referred to the Committee on Education and Labor

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## A BILL

To amend the Employee Retirement Income Security Act of 1974 to preclude preemption of a State cause of action relating to a denial of a claim for benefits under a health care plan.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. ERISA PREEMPTION NOT TO APPLY TO CER-**  
4 **TAIN STATE LAW CAUSES OF ACTION.**

5 (a) IN GENERAL.—Section 514 of the Employee Re-  
6 tirement Income Security Act of 1974 (29 U.S.C. 1144)  
7 is amended—

1           (1) by redesignating subsections (d) and (e) as  
2           subsection (e) and (f), respectively, and

3           (2) by inserting after subsection (c) the fol-  
4           lowing new subsection:

5           “(d) PREEMPTION NOT TO APPLY TO CAUSES OF  
6 ACTION UNDER STATE LAW INVOLVING MEDICALLY RE-  
7 VIEWABLE DECISION.—

8           “(1) IN GENERAL.—Except as provided in this  
9           subsection, nothing in this title (including section  
10          502) shall be construed to supersede or otherwise  
11          alter, amend, modify, invalidate, or impair any cause  
12          of action under State law of a participant or bene-  
13          ficiary under a group health plan (or the estate of  
14          such a participant or beneficiary) against the plan,  
15          the plan sponsor, any health insurance issuer offer-  
16          ing health insurance coverage in connection with the  
17          plan, or any managed care entity in connection with  
18          the plan to recover damages resulting from personal  
19          injury or for wrongful death if such cause of action  
20          arises by reason of a medically reviewable decision.

21          “(2) DEFINITIONS AND RELATED RULES.—For  
22          purposes of this subsection—

23                  “(A) MEDICALLY REVIEWABLE DECI-  
24                  SION.—The term ‘medically reviewable decision’

1 means a denial of a claim for benefits under the  
2 plan.

3 “(B) PERSONAL INJURY.—The term ‘per-  
4 sonal injury’ means a physical injury and in-  
5 cludes an injury arising out of the treatment  
6 (or failure to treat) a mental illness or disease.

7 “(C) CLAIM FOR BENEFIT.—The term  
8 ‘claim for benefits’ means any request for cov-  
9 erage (including authorization of coverage), for  
10 eligibility, or for payment (or reimbursement  
11 for payment) in whole or in part, for an item  
12 or service under a group health plan or health  
13 insurance coverage.

14 “(D) DENIAL OF CLAIM FOR BENEFITS.—  
15 The term ‘denial’ means, with respect to a  
16 claim for benefits, a denial (in whole or in part)  
17 of, or a failure to act on a timely basis upon,  
18 the claim for benefits and includes a failure to  
19 provide benefits (including items and services)  
20 required to be provided under this title.

21 “(E) MANAGED CARE ENTITY.—

22 “(i) IN GENERAL.—The term ‘man-  
23 aged care entity’ means, in connection with  
24 a group health plan and subject to clause  
25 (ii), any entity that is involved in deter-

1 mining the manner in which or the extent  
2 to which items or services (or reimburse-  
3 ment therefor) are to be provided as bene-  
4 fits under the plan.

5 “(ii) TREATMENT OF TREATING PHY-  
6 SICIANS, OTHER TREATING HEALTH CARE  
7 PROFESSIONALS, AND TREATING HOS-  
8 PITALS.—Such term does not include a  
9 treating physician or other treating health  
10 care professional of the participant or ben-  
11 efiary and also does not include a treat-  
12 ing hospital insofar as it is acting solely in  
13 the capacity of providing treatment or care  
14 to the participant or beneficiary. Nothing  
15 in the preceding sentence shall be con-  
16 strued to preempt vicarious liability of any  
17 plan, plan sponsor, health insurance issuer,  
18 or managed care entity.

19 “(3) EXCLUSION OF EMPLOYERS AND OTHER  
20 PLAN SPONSORS.—

21 “(A) CAUSES OF ACTION AGAINST EM-  
22 PLOYERS AND PLAN SPONSORS PRECLUDED.—  
23 Subject to subparagraph (B), paragraph (1)  
24 does not apply with respect to—

1           “(i) any cause of action against an  
2           employer or other plan sponsor maintain-  
3           ing the plan (or against an employee of  
4           such an employer or sponsor acting within  
5           the scope of employment), or

6           “(ii) a right of recovery, indemnity, or  
7           contribution by a person against an em-  
8           ployer or other plan sponsor (or such an  
9           employee) for damages assessed against  
10          the person pursuant to a cause of action to  
11          which paragraph (1) applies.

12          “(B) CERTAIN CAUSES OF ACTION PER-  
13          MITTED.—Notwithstanding subparagraph (A),  
14          paragraph (1) applies with respect to any cause  
15          of action that is brought by a participant or  
16          beneficiary under a group health plan (or the  
17          estate of such a participant or beneficiary) to  
18          recover damages resulting from personal injury  
19          or for wrongful death against any employer or  
20          other plan sponsor maintaining the plan (or  
21          against an employee of such an employer or  
22          sponsor acting within the scope of employment)  
23          if such cause of action arises by reason of a  
24          medically reviewable decision, to the extent that  
25          there was direct participation by the employer

1 or other plan sponsor (or employee) in the deci-  
2 sion.

3 “(C) DIRECT PARTICIPATION.—

4 “(i) DIRECT PARTICIPATION IN DECI-  
5 SIONS.—For purposes of subparagraph  
6 (B), the term ‘direct participation’ means,  
7 in connection with a decision described in  
8 subparagraph (B), the actual making of  
9 such decision or the actual exercise of con-  
10 trol in making such decision or in the con-  
11 duct constituting the failure.

12 “(ii) RULES OF CONSTRUCTION.—For  
13 purposes of clause (i), the employer or plan  
14 sponsor (or employee) shall not be con-  
15 strued to be engaged in direct participation  
16 because of any form of decisionmaking or  
17 other conduct that is merely collateral or  
18 precedent to the decision described in sub-  
19 paragraph (B) on a particular claim for  
20 benefits of a particular participant or bene-  
21 ficiary, including (but not limited to)—

22 “(I) any participation by the em-  
23 ployer or other plan sponsor (or em-  
24 ployee) in the selection of the group  
25 health plan or health insurance cov-

1 erage involved or the third party ad-  
2 ministrator or other agent;

3 “(II) any engagement by the em-  
4 ployer or other plan sponsor (or em-  
5 ployee) in any cost-benefit analysis  
6 undertaken in connection with the se-  
7 lection of, or continued maintenance  
8 of, the plan or coverage involved;

9 “(III) any participation by the  
10 employer or other plan sponsor (or  
11 employee) in the process of creating,  
12 continuing, modifying, or terminating  
13 the plan or any benefit under the  
14 plan, if such process was not substan-  
15 tially focused solely on the particular  
16 situation of the participant or bene-  
17 ficiary referred to in paragraph  
18 (1)(A); and

19 “(IV) any participation by the  
20 employer or other plan sponsor (or  
21 employee) in the design of any benefit  
22 under the plan, including the amount  
23 of copayment and limits connected  
24 with such benefit.”.

1           (b) CONFORMING AMENDMENT.—Section 502(b)(4)  
2 of such Act (29 U.S.C. 1132(b)(4)) is amended by striking  
3 “514(e)(3)” and inserting “514(f)(3)”.

4           (c) EFFECTIVE DATE.—The amendments made by  
5 this section shall apply to acts and omissions (from which  
6 a cause of action arises) occurring on or after the date  
7 of the enactment of this Act.

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