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ERISA & DISABILITY BENEFITS NEWSLETTER

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ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits. Eric Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the National Board of Social Security Disability Advocacy. For more information, visit our website at [www.buchanandisability.com](http://www.buchanandisability.com).

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Hudson Ellis, Valerie Norwood, Eric Buchanan & R. Chandler Wilson

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AN OWNER CAN ESCAPE ERISA

BY HUDSON T. ELLIS

Disability attorneys regularly fight over whether ERISA or state contract law governs a claim; insurers almost universally aim for ERISA's applicability, hoping to shield their denials under a favorable standard of review and avoid punitive remedies, while Plaintiffs fight for the reverse for the same reason. Since the winner of this battle often fights from a strategic and financial advantage, being familiar with the type of claims ERISA does not reach is important. One of the lesser known exceptions to ERISA's applicability involves owners and shareholders.

Going back to before 2004, the circuits were split over whether a working owner could even qualify as a participant in an ERISA plan. The issue was rooted in the definition of a plan "participant", which was "any employee or former employee of an employer...who is or may become

eligible to receive a benefit" from a benefit plan. 29 U.S.C. § 1002(7). This created a problem because the statutory text stated that an "employer" means "any person acting directly as an employer" and an "employee" was "any person acting directly as an employee." 29 U.S.C. § 1002(5, 6).

Before 2004, the First, Sixth, Seventh, and Tenth Circuits essentially agreed that an owner, as the "employer" rather than an "employee," could not qualify as a "participant" in an ERISA plan. See, e.g., *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 963 (1st Cir. 1989); *Fugarino v. Hartford Life & Acc. Ins. Co.*, 969 F.2d 178, 186 (6th Cir. 1992); *Giardono v. Jones*, 867 F.2d 409, 411-412 (7th Cir. 1989); *Peckham v. Board of Trustees of Int'l Brotherhood of Painters and Allied Trades Union*, 653 F.2d

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424, 427–428 (10th Cir. 1981). In contrast, the Fourth, Fifth, Seventh, and Ninth Circuits found that, where the plan covered both owners and non-owner employees, the plan was covered by ERISA and the owner was a participant of the plan. See, e.g., *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444, 450 (4th Cir. 1993); *Vega v. Nat'l Life Ins. Servs., Inc.*, 188 F.3d 287, 294 (5th Cir. 1999); *Matter of Baker*, 114 F.3d 636, 639 (7th Cir. 1997); *In re Watson*, 161 F.3d 593, 596 n.4 (9th Cir. 1998).

The Supreme Court resolved the split in 2004 when it took the issue up in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004). Yates was the sole shareholder of a corporation that maintained a profit sharing plan for himself, his wife, and at least one non-owner employee. Justice Ginsberg delivered the Court's opinion, holding that where a plan covers only sole owners or partners and their spouses, ERISA would not apply; however, "[p]lans covering working owners and their nonowner employees [...] fall entirely within ERISA's compass." *Id.*, at 21.

Essentially, Yates makes clear that an ERISA plan is established where it covers even just one non-owner employee, who is not the owner's spouse, the owner can be a participant of that ERISA plan. However, other questions remain less clear. Some of these questions have been tackled by circuit and district courts.

For example, what about multi-shareholder corporations? Some courts have come to the conclusion that, where there are multiple shareholders owning shares in a corporation, the shareholders are considered employees and ERISA applies where they are all covered under the same plan. See *Santino v. Provident Life & Acc. Ins. Co.*, 276 F.3d 772, 776 (6th Cir. 2001); ,

256 F.3d 1006, 1011 (10th Cir. 2001). Under this authority, a shareholder was found to be an employee even where two of the three shareholders were husband and wife, and the third shareholder was an LLC wholly owned by the same husband and wife. *Andre-Pearson v. Grand Valley Health Plan, Inc.*, 963 F. Supp. 2d 766, 774 (W.D. Mich. 2013).

On the other hand, the Ninth Circuit's Kennedy decision, finding that a plan was not ERISA qualified where owners, plural, were the only participants in a plan, remains good law post Yates<sup>1</sup>. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 264 (9th Cir. 1991). The same result occurred in Alabama where a corporation's only two shareholders were covered by the plan. *McLain v. Unum Life Ins. Co. of Am.* 2013 WL 3242842, at \*4 (N.D. Ala. June 21, 2013); see also, *Robertson v. Alexander Grant & Co.*, 798 F.2d 868, 871 (5th Cir. 1986); *Hayes v. Lacey & Jones*, 2007 WL 781879, at \*2 (E.D. Mich. Mar. 13, 2007). *Strobel v. Provident Life & Acc. Ins. Co.*, 2011 WL 5396033, at \*4 (D. Minn. Aug. 3, 2011). *McGowan v. U.S. Life Ins. Co. In City of New York*, 2007 WL 196471, at \*1 (S.D.N.Y. Jan. 24, 2007).

Also, since Yates, the Fifth Circuit has examined the question whether one coverage class of a law firm's long term disability plan, which class was reserved exclusively for partners, should be considered a separate non-ERISA plan, rather than simply a part of a single overarching ERISA plan. *House v. Am. United Life Ins. Co.*, 499 F.3d 443, 450 (5th Cir. 2007). In finding the entire plan, including the partner class, covered by ERISA, the House court noted that the partners and employees were covered under a single, comprehensive plan, the plan was bargained and paid for as a package with a single subscription

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agreement, and the policy terms covering partners and employees were in large part identical.

Ultimately, the only definitive answer is that a traditional owner (singular) who buys a policy through his/her company but only covers himself is not covered by ERISA, and conversely, if that policy at some point covers a non-owner employee, ERISA would apply (unless the only non-owner is the owner's spouse). Outside of that, and absent further direction from the Supreme Court or the

court of appeals in the relevant jurisdiction, there remains room to argue either side of this issue in many scenarios. That being the case, when an owner or shareholder walks through your door with what appears to be an issue related to an ERISA plan, do not take the insurance company's word for ERISA's applicability. Instead, either call an ERISA attorney or do the research to track down the current status of this changing area of the law.

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### END NOTES

<sup>1</sup>*Kennedy's* finding were recently reviewed and relied upon in an interesting recent case out of California, where the Court found ERISA did not apply to a plan that covered only two shareholders who had been married during the relevant period, but had divorced before the matter went to court. *McVey v. McVey*, 26 F. Supp. 3d 980, 990 (C.D. Cal. 2014).

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### ERIC BUCHANAN & ASSOCIATES, PLLC: UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the following events:

- AAJ Annual Convention in Boston, MA on July 24th, 2017  
**Topic:** Recent ERISA decisions and how to use them in your practice
- NOSSCR Conference in Phoenix, Arizona on September 13-16, 2017  
**Topic:** ERISA Long Term Disability Claims for Social Security Practitioners, From the Basics to an Update of the Current State of ERISA LTD Litigation

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### NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates, PLLC are available to speak to your organization regarding social security disability, ERISA long-term disability, group long-term disability, private disability insurance, ERISA benefits, denied health insurance claims and life insurance claims.

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**Eric Buchanan & Associates, PLLC** is a boutique plaintiffs' firm located in Chattanooga, Tennessee. We help individuals nationwide obtain disability insurance benefits and other ERISA employee welfare benefits (such as life, health or disability benefits offered through work). Attorneys are our number one source of cases. If you have a client who could use our help, we would appreciate your referral.

### **Eric's disability and benefits team can help!**



- ERISA Long-Term Disability
- Group Long-Term Disability
- Private Disability Insurance
- ERISA Benefits
- Denied Health Insurance Claims
- Life Insurance Claims
- Long-Term Care Claims
- Social Security Disability

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**We appreciate the opportunity to work with you on any of these cases.  
Contact our Intake Team at [intaketeam@buchanandisability.com](mailto:intaketeam@buchanandisability.com).**

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