EMPLOYEE BENEFITS DEVELOPMENTS NOVEMBER 2014

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CASES

Health Care Cost Consideration May Support Age Discrimination Claim. Recently, the U.S. Court of Appeals for the Eighth Circuit overturned a lower court's summary judgment ruling against a plaintiff's age discrimination claim. In this case, the plaintiff alleged that her former employer terminated her employment because her age negatively affected its employee health insurance costs. The plaintiff cited several e-mails between the employer and the insurer that indicated the employer believed that its insurance rates would decrease as the employer's employee population became "younger and healthier." The defendant employer argued that age and health are analytically distinct and therefore a decision based on health costs would not constitute age discrimination. However, the court held that age and health care costs would not necessarily be analytically distinct if the employer presumed the rise in age necessitated a rise in health costs. Because there remains a question of fact as to the employer's motivation for terminating the plaintiff, the court reversed the lower court's summary judgment decision and remanded the case. *Tramp v. Associated Underwriters, Inc.* (8th Cir. 2014)

Court Creates Additional Exposure for Claim Processing Violations. In a controversial decision, the U.S. District Court for the District of Connecticut recently held that a plan administrator can be subject to civil penalties if it fails to substantially comply with an Employee Retirement Income Security Act (ERISA) regulation that details the procedures a claims fiduciary must follow when it makes an adverse decision in connection with a participant's claim for benefits. The plaintiff in this case sued after the medical plan in which she was enrolled denied her request for out-of-network emergency care. She alleged that the plan fiduciary failed to comply with the ERISA claims regulation and acted in an arbitrary and capricious manner in denying her request for out-of-network benefits. When a participant's claim for benefits is denied, the ERISA claims regulation requires the responsible claims fiduciary to provide the participant with written notice that a) details the specific reason or reasons for the denial; and b) references the specific plan provisions on which the denial is based. Participants have the right to appeal the plan's decision. The requirements are meant to afford participants, who have the right to appeal the decision, the opportunity to fully address the plan's determination and present evidence and arguments on appeal. The regulation sets strict time limits for decisions on initial determinations and appeals, which are quite short in situations that involve urgent care claims.

In this case, the plaintiff—and the Department of Labor (DOL), in a brief filed with the court—argued that the plan fiduciaries failed to follow a number of these requirements and, therefore, failed to substantially comply with the procedural requirements of the regulation. As a result of the claim fiduciary's substantial noncompliance with the regulation, the plaintiff argued that the benefit denial rendered by the fiduciary should be given no deference by the court. In other words, the plan's substantial noncompliance with the regulation should result in a loss of the deferential standard of review that the court would otherwise apply in reviewing the decision of the claims fiduciary. The court went one step further and ruled that substantial noncompliance with the claims regulation could also result in civil penalties, a position which does not appear to have been supported by the DOL in its brief to the court. While the court acknowledged that the plan's communications of its claims denials "were not ideal (and in some instances failed to comply with ERISA regulations)," the court held that the substance and timing of its denials were not so deficient as to result in the loss of the deferential standard of review or render the plan administrator liable for civil penalties. As a result of this precedent, and assuming it holds, employers now have a direct economic incentive to ensure that claims disputes are resolved in substantial compliance with ERISA's claims procedure regulation. *Halo v. Yale Health Plan* (D. Conn., 2014)

ESOP Fiduciary Found Liable for Improperly Influencing Valuation of Company Sold to ESOP. In a series of transactions, the owner of a satellite installation company sold over 50 percent of the company to an employee stock ownership plan (ESOP) for $18.4 million. The trustees of the ESOP consisted of the selling owner of the company and two individuals found to be loyal to him. The trustees based the purchase price paid to the owner by the ESOP on valuations of the company performed by an appraiser the trustees had retained to serve as independent appraiser and financial advisor to the ESOP trust. ESOP participants and the U.S. Department of Labor filed lawsuits claiming that the valuations were inflated. The defendant trustees disputed whether the appraiser was improperly influenced by the owner.

After a 19-day bench trial, the court found that the appraiser was more loyal to the owner than to the ESOP trust. The court found that the appraiser offered to reduce his fee if given the opportunity to do an ESOP feasibility study for the owner of the company. The court also found that the appraiser began his involvement in this matter by working directly for the owner and not for the ESOP trust, that the appraiser was not informed by the owner of critical aspects of the business when performing his valuation, and that the ESOP trustees failed to investigate the appraiser's qualifications, which indicated that the appraiser lacked a college degree, had been convicted of fraud, and was operating under an assumed name. In light of this, the court found it was not reasonable for the ESOP trustees to rely on the appraiser's conclusions of the value of the company. The court found the ESOP trustees had committed a breach of their fiduciary duties and determined that they should pay the ESOP the amount it overpaid for the stock. Expert opinions found the ESOP trustees liable for a $4.5 million overpayment and the owner liable for $2 million in pre-judgment interest. This case, along with many others, illustrate the importance of having independent counsel and an independent qualified appraiser involved in any transaction involving the sale of stock to a retirement plan or ESOP. *Perez v. Bruister* (S.D. Miss., 2014)

Plan May Incorporate Appeal Deadline by Referencing SPD. An employee injured her back and filed a claim under the employer's long-term disability benefit plan. The benefit plan initially denied the employee's claim and then later reversed that decision after a successful court challenge by the employee. The insurance company that administered claims under the employer's long-term disability benefit plan subsequently determined the employee could perform "sedentary" work and was no longer eligible for disability benefits. The employee was advised that she had 180 days to appeal the insurance company's decision. In response to a request by the employee's counsel, the insurance company provided certain documentation, including a plan document, but no summary plan description (SPD). Despite having been notified by the insurance company about the 180-day appeals deadline, the employee did not file an appeal until after the appeals period had expired. The insurance company then denied the appeal as untimely, at which point the employee filed suit.

The employee asserted, among other things, that ERISA required the benefit plan to include the appeals deadline in the "written plan instrument" and that the plan's written instrument makes no mention of the deadline. The federal district court that heard the case granted summary judgment to the insurance company and declined to excuse the employee's failure to file her appeal with the insurance company within the 180-day period.

The employee appealed the district court decision to the U.S. Court of Appeals for the First Circuit, which affirmed the district court ruling. The First Circuit declined to consider the issue of whether ERISA requires the plan's written instrument to set forth the 180-day appeals deadline, because the court concluded the employee was wrong to contend that the written instrument in this instance omitted the deadline. While the plan document did not set forth the appeals deadline, it did incorporate the SPD by reference, and the SPD expressly set forth the plan's claims procedures, including the 180-day appeals deadline. The First Circuit held that incorporation of the claims procedure into the plan document by referencing the SPD is permitted. The holding, however, is narrow in scope. The court specifically limited its holding by deciding only that "a benefit plan may expressly incorporate its internal appeals deadline into the written instrument through a summary plan description and that, when a benefit plan does so, a beneficiary's failure to meet that deadline may bar her attempt to challenge an adverse benefit decision in court."

The employee also asserted that the plan should be estopped from enforcing the appeals procedure because the insurance company failed to produce, when requested, the SPD that outlined the appeals procedure. The court rejected that argument, holding that "even if such an argument for estoppel were cognizable under ERISA…estoppel would not free [the employee] from having to satisfy the 180-day appeals deadline." Counsel for the employee received multiple warnings that a 180-day internal appeals deadline applied to her case. The court found no misrepresentation with respect to the appeals deadline and concluded counsel for the employee could not be said to have acted reasonably by disregarding the deadline warnings. *Tetreault v. Reliance Standard Life Ins. Co.* (1st Cir., 2014).

ERISA Venue Selection Clause Upheld by the Sixth Circuit. A participant was informed that the pension plan that was paying him retirement benefits had been overpaying those benefits for 11 years. To correct the $153,283 of overpayments, the plan notified the participant that it would be eliminating the participant's entire monthly benefit until the overpayment was recouped. After exhausting his administrative remedies, the participant filed suit in Kentucky. The plan, however, had a venue selection clause that required actions in connection with the plan to be brought in federal district court in Cedar Rapids, Iowa. The case was dismissed by the district court because of the plan's venue selection clause.

The participant appealed to the U.S. Court of Appeals for the Sixth Circuit. The Department of Labor (DOL) filed an amicus brief in support of the participant's position. Together, the participant and the DOL argued that venue selection clauses are incompatible with ERISA because they inhibit ready access to federal courts, and because they conflict with ERISA's venue provision under which an action "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found." The court rejected these arguments and affirmed the district court decision, holding that 1) the participant and the DOL failed to explain how a venue selection clause inhibits access to federal courts when the clause provides for venue in a federal court, and 2) ERISA's venue provision is permissive and does not conflict with the plan's chosen venue in this case.

It is notable that the Sixth Circuit in this case chose not to defer to the interpretation of ERISA expressed in the DOL's amicus brief. The court's opinion did address the level of deference to be afforded to the DOL position, as expressed in its amicus brief. But the Sixth Circuit ultimately concluded that even if the court gave the DOL's interpretation heightened deference, ERISA and previous precedent in the Sixth Circuit do not support the DOL's position. It is also notable that there was a dissenting opinion in this case that essentially argued that requiring a plaintiff to litigate in a distant venue imposes an increase in expense and an inconvenience that can obstruct access to federal courts. *Smith v. AEGON Cos. Pension Plan* (6th Cir., 2014)

State Claims Dismissed Because Severance Plan Determined to be an ERISA Plan. In a related decision involving the same plaintiff as in the preceding case (and the same benefit overpayment claim), the Sixth Circuit also upheld the district court's dismissal of the plaintiff's state-law claims because the severance program at the heart of the complaint was determined to be an ERISA plan. The $153,283 overpayment described above was related to a voluntary retention and retirement program adopted by the plaintiff's employer at the time of a corporate merger. The employer's qualified retirement plan was amended to provide for payment of benefits under the new program. On his retirement in 2000, the employee began receiving benefits under both the qualified retirement plan and the retention program. In 2011, the pension plan informed him that they had been overpaying him and demanded recoupment of the overpayment. After exhausting his administrative remedies under the pension plan, the employee filed suit against the company for state-law breach of contract claims and statutory wage and hour violations. Following removal of the case to federal court, the district court dismissed the complaint on grounds that the retention program was an ERISA plan and that the company was not the proper defendant for such a claim. On appeal, the Sixth Circuit upheld the lower court's dismissal of the claim, finding that by virtue of the amendment (which, coincidentally, had been drafted by the employee himself), the retention program was part of the qualified retirement plan, which is governed by ERISA. Because of the amendment, the retirement program was held not to be a separate severance agreement. According to the court, however, even if the retention program had not been drafted as part of the ERISA retirement plan, it would still be an ERISA plan because the administrator was required to exercise discretion by analyzing the individual circumstances of each potential participant to determine eligibility and the level of benefits. As a result, the employee's state-law claims were held to be preempted by ERISA, and, because the defendant should have been the pension committee and not the company, the court dismissed the complaint. *Smith v. Commonwealth Gen. Corp.* (6th Cir., 2014)

Court Upholds Obligation to Make Withdrawal Liability Payments While Dispute Continues. A multiemployer pension fund determined that an employer had withdrawn from the fund and notified the employer of its withdrawal liability and the monthly payments required to pay the liability. After making the first 12 monthly withdrawal payments, the withdrawing employer stopped paying the amounts to the fund. The fund filed an action against the employer, seeking outstanding interim payments, interest, liquid damages, and attorney's fees and costs. As a defense, the employer claimed that the requirement to make interim payments would cause it irreparable injury and asked the court to grant equitable exception to the requirement to make these payments. The District Court of the District of Columbia ruled against the employer, finding that there was no equitable exception for irreparable injury under the law. The court distinguished a ruling in the Second Circuit that granted an exception in a situation where that court found that requiring payments during arbitration of the withdrawal liability assessment would create a distinct likelihood of a business failure. The court found no similar allegations were made in this case and that there were also no allegations that the withdrawal liability claim was frivolous or not colorable. *Boland v. WASCO, Inc.* (D.D.C., 2014)

RULINGS, ETC.

IRS Simplifies Tax Reporting for Individuals with Canadian Retirement Plans. In general, a U.S. citizen or resident who is a beneficiary of a Canadian registered retirement savings plan (RRSP) or registered retirement income fund (RRIF) is subject to current U.S. income taxation on income accrued under the plan, even if that income is not currently distributable to the individual. However, under Article XVIII(7) of the United States-Canada Income Tax Convention, a U.S. citizen or resident who is a beneficiary under an RRSP or RRIF may elect to defer U.S. income taxation on that income until the amounts are distributed from the plan.

In 2004, the Internal Revenue Service (IRS) released Form 8891 (U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans) for the purpose of satisfying certain reporting requirements for RRSPs and RRIFs and to allow U.S. citizens and residents to elect to defer U.S. taxation on income earned in the plans. The IRS recently issued guidance updating the procedures for making such an election and relaxing the reporting requirements associated with these plans.

Under the IRS guidance, an "eligible individual" who has not previously made an election to defer taxation on the undistributed income of an RRSP or RRIF under Article XVIII(7) will nevertheless be treated as having made such an election as of the first year the beneficiary could have made the election. The individual will not be required to make the election for the first year or for any subsequent years to receive Article XVIII(7) treatment. Deferral of taxation under these rules applies only to income accrued in a plan and not to any contributions to the plan. An eligible individual is a beneficiary of an RRSP or RRIF who is or was at any time a U.S. citizen or resident while a beneficiary of the plan, and who:

1. Has satisfied any requirement for filing a U.S. federal income tax return for each taxable year during which the individual was a U.S. citizen or resident;
2. Has not previously reported as gross income on a U.S. federal income tax return the earnings accrued in, but not distributed by, the plan during any taxable year in which the individual was a U.S. citizen or resident; and
3. Has reported any distributions from the plan as if the individual had made an election under Article XVIII(7) for all years during which the individual was a U.S. citizen or resident.

Beneficiaries who have reported on their U.S. federal income tax returns undistributed income accrued under an RRSP or RRIF in prior years are not eligible to make an Article XVIII(7) election under the new rules. Instead, the undistributed income will continue to be taxed unless they receive the consent of the IRS to make an election under Article XVIII(7).

Finally, any taxpayer who has previously made an Article XVIII(7) election is not required to file a Form 8891 for taxable years ending after December 31, 2012. Any revocation of a prior election would require the consent of the IRS.

Subject to any future guidance from the IRS, U.S. citizens and residents who are beneficiaries under an RRSP or RRIF (regardless of whether they are "eligible individuals," as described above) are no longer required to file Form 8891 or Form 3520 with respect to their interests in the plans. In addition, custodians are not required to file Form 3520-A. It should be noted, however, that the IRS guidance does not eliminate other reporting requirements such as the obligation to file Form 8938 (Statement of Foreign Financial Assets) or a Report of Foreign Bank and Financial Account (FBAR). *(Rev. Proc. 2014-55)*