Lessons For Employers From Recent Fiduciary Litigation

Insights
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There has been a surge of court decisions over the last year addressing fiduciary liability for welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA). These lawsuits should prompt you to question how your ERISA-covered welfare benefit plans are being administered and craft new approaches to limit potential breach of fiduciary duty claims. When it comes to such claims, the best defense is a good offense. Accordingly, we have highlighted below a few lessons from recent lawsuits that you should heed to help keep breach of fiduciary duty claims at bay.

1. 1. **Maintain Legally Compliant Plan Documents And Summary Plan Descriptions (SPDs)**

   Employee benefit plans subject to ERISA are generally required to maintain plan documents and summary plan descriptions (SPDs). The 2nd Circuit Court of Appeals recently underscored the importance of maintaining legally-compliant SPDs. The court's decision in *In re: Emily DeRogatis* ruled that the plan administrator may have breached its fiduciary duty to provide complete and accurate plan-related information (in part) because the plan's SPD was legally deficient.

   The plaintiff in the case was the beneficiary of a deceased employee seeking benefits under the employer's pension and welfare plans. Ms. DeRogatis filed lawsuits against the trustees of each plan seeking benefits and alleging that fiduciary duties were breached. Her claims were based on misrepresentations by non-fiduciary plan representatives regarding survivor benefits under the pension plan and post-retirement medical benefits under the welfare plan.

   The court dismissed Ms. DeRogatis's fiduciary claim under the pension plan because the plan's SPD clearly communicated the eligibility requirements for the various pension and survivor benefits available under that plan, thereby satisfying the pension fund's fiduciary duty to provide complete and accurate information. However, Ms. DeRogatis's claim against the welfare fund survived because the welfare plan's SPD did not adequately inform her of applicable benefit limitations. In ruling that the SPD was deficient, the court specifically noted the SPD's unreasonable length (156 pages), illogical organization (based on alphabetical section names, not subject matter), opaque language, and misuse and inconsistent use of defined terms.

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The court's decision and reasoning sheds light on the importance of maintaining legally compliant SPDs written in a clear, complete, and user-friendly manner. You should have your SPDs reviewed by legal counsel to confirm that they are accurate and meet ERISA's content requirements. Legal review is particularly important after amending plan benefits or other terms and conditions of coverage to ensure that changes are correctly captured.

The court's decision also highlights fiduciary liabilities that may arise as a result of actions by non-fiduciaries. Although Ms. DeRogatis was provided false information by non-fiduciary plan representatives, the court nevertheless found that the misstatements—coupled with the insufficient SPD—may be sufficient to hold plan fiduciaries liable for a breach.

2. **Distribute SPDs And Other ERISA-Required Disclosures To Employees On A Timely Basis**

ERISA also requires that SPDs be distributed to participants covered by the plan (1) within 90 days after the participant first becomes covered under the plan; (2) every five years (with some exceptions if there have been no changes to the plan); and (3) upon demand. In January 2019, an Iowa district court found that an employer's failure to distribute a copy of its group life insurance policy or SPD to an employee was a sufficient fiduciary breach to justify requiring the employer to cover the full value of the benefit allegedly lost as a result of the failure. In *Snitselaar v. Unum Life Ins. Co. of Am.*, the employee had enrolled herself and her spouse in the employer's group life plan that was insured by a policy issued by Unum Life Insurance Company of America. The employee was advised by her employer that she could not lose coverage for life changes after the policy's two-year waiting period, and was never informed that divorce would affect the coverage. She was also never provided an SPD or a certificate of insurance.

The employee subsequently divorced her husband, who then died following the divorce. When she sought to collect his life insurance proceeds, the carrier denied the claim because the policy required that the employee be married at the time of death to receive benefits for a spouse. The court upheld the carrier's benefit denial based on the terms of the policy. However, the employee also filed a breach of fiduciary claim against her employer for failing to provide her with a SPD and certificate of insurance (thus causing her to be unaware of the plan's terms). The court agreed and ordered the employer to pay the employee $60,000—the full amount of the lost life insurance benefit.

The court's decision reminds employers that you must distribute SPDs in accordance with ERISA, and those SPDs must accurately describe the terms and conditions for obtaining benefits under the plan. Failure to convey accurate and complete plan-related information to participants exposes plan fiduciaries to liability, and those fiduciaries may be responsible for making up benefits missed as a result of the failure.</p

3. **Maintain Oversight Of Plan Administrators And Regularly Assess Plan Operations For Fiduciary Compliance**

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Fiduciary Compliance

Plan administrators play an important role in keeping the plan operating in compliance with the plan's terms and with ERISA. As we mentioned, fiduciaries must run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses. These obligations are often referred to as the "duty of undivided loyalty" and the "exclusive benefit rule." It is crucial to maintain adequate oversight of plan administrators to confirm that the plan's operations do not violate fiduciary obligations.

In one of the first cases of the new year, the 8th Circuit Court of Appeals recently found that a health plan administrator's practice of cross-plan offsetting was not permitted by the terms of the plan document and likely constituted a breach of the administrator's fiduciary duties (*Peterson v. UnitedHealth Group, Inc.*). Cross-plan offsetting is a practice whereby the administrator recoups overpayments by withholding any overpaid amounts from subsequent payments to the same provider (but not necessarily for claims under the same plan). UnitedHealth had agreements with its in-network providers allowing this practice, but did not have similar agreements with out-of-network providers. Accordingly, the out-of-network providers brought suit alleging that the practice was improper.

To justify its use of cross-plan offsetting with the out-of-network providers, UnitedHealth tried to rely on plan language granting it broad discretion to interpret plan provisions. But the court held that this interpretation was unreasonable, and that the practice may violate fiduciary duties owed to each plan separately under the exclusive benefit rule "because it arguably amounts to failing to pay a benefit owed to a beneficiary under one plan in order to recover money for the benefit of another plan. While this benefits the latter plan, it may not benefit the former." The court noted that the practice may also constitute an impermissible transfer of money from one plan to another.

It is important to note that the court only raised the questions of whether these practices are ERISA violations. However, based on the court's concern regarding those types of practices by third-party administrators of group health plans, employers sponsoring self-insured plans should consult legal counsel if your third-party administrator utilizes cross-plan offsetting or similar practices to assess whether you are in danger of violating the exclusive benefit rule and gauge the risk associated with continuing the practice.

Conclusion

If you have questions about whether your welfare plans or programs are at risk for fiduciary violations, contact any member of the Fisher Phillips Employee Benefits Practice Group.

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