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ATTORNEYS AT LAW

Benefits News

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Those Pesky Plan Documents…What do They Have to do With my Fiduciary Duties?

Deborah Fabricant

Worrying about plan documents probably is not keeping most plan fiduciaries up at night…but maybe it should. Although most plan fiduciaries are aware of their duties of prudence and loyalty (after all, even the mainstream media loves to report about the Tibble case[1], as well as recent excessive fee and stock drop cases), plan fiduciaries may not be tuned into their equally important (but less newsworthy) duty to follow the terms of their written plan documents.[2]

This "sleeper" duty could catch even the most seemingly prudent and loyal fiduciary by surprise, exposing them to potential legal and/or regulatory action by the U.S. Department of Labor ("DOL") and/or private parties. Moreover (and contrary to the common belief among some plan administrators and other fiduciaries), the IRS Employee Plans Compliance Resolution System ("EPCRS") is not designed to, and will not necessarily, protect them from individual fiduciary liability if a breach of that duty caused a loss to the plan.[3] Fiduciary liability is governed by ERISA, not the Code, and thus, even where the IRS signs off on a plan correction under EPCRS, the DOL (or a court, in response to a lawsuit by the DOL or a private litigant) could still require plan fiduciaries, under ERISA, individually to restore losses/profits to the plan. A court also has the

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[1] Tibble v. Edison Int'l, 135 S. Ct. 1823 (2015)

[2] ERISA Section 404(a)(1) requires a fiduciary to act solely in the interest of plan participants and beneficiaries in four ways: 1) "for the exclusive purpose of providing benefits to participants and their beneficiaries…"; (the "duty of loyalty"); 2)"with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use…" (the "duty of prudence"); 3) "by diversifying the investments of the plan…" (the "duty to diversify"); and 4) "*in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA] III.*" (the "plan document duty") (emphasis added.)

[3] See our newsletter for information on determining whether to utilize EPCRS. http://www.boutwellfay.com/wp-content/uploads/2017/09/To-VCP-or-Not-to-VCP-Part-1.pdf and http://www.boutwellfay.com/wp-content/uploads/2017/12/To-VCP-or-Not-to-VCP-That-is-a-Plan-Sponsors-Question-Part-2.pdf

authority to impose penalties and order other injunctive relief.[4] What this all means is knowing and following governing plan documents is a big deal for plan fiduciaries.

What is a fiduciary's duty with respect to plan documents?

ERISA § 404(a)(1)(D) requires a fiduciary to discharge his duties solely in the interest of the plan's participants and beneficiaries "*in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent [with ERISA.]*" This plan document duty really involves two duties: 1) a duty to know and follow the terms of the governing plan documents; and 2) a duty to review the governing plan documents to determine if they are consistent with ERISA. (If the plan document is not consistent with ERISA, it will be up to the plan fiduciary to consult with their own counsel and then take prudent steps in light of the inconsistency, e.g., alert the plan Sponsor.

How does a violation of the Section 404(a)(1)(D) plan document duty typically come up?

A violation of § 404(a)(1)(D) can come up in litigation and/or a DOL investigation.

As a practical matter, lawsuits that allege a violation of the plan document duty often also allege violations of the duty of prudence and the duty of loyalty. However, some cases rely on § 404(a)(1)(D). Bergeron v. Ochsner Health System, 63 EBC 1377 (E.D. La. August 23, 2017) is illustrative.

In Ochsner, medical clinic employees filed a class action against the clinic alleging a variety of wage and hour claims under both state and federal law and also alleging a violation of ERISA's fiduciary requirement to follow the 401(k) plan document on the ground that the clinic failed to treat overtime compensation and other unpaid wages as "eligible compensation" as defined under "the written terms of [the sponsor's] plan."[5] The clinic responded by moving to dismiss the lawsuit. The court refused to dismiss the plan document claim expressly holding that "ERISA directs that plans be administered, and benefits be paid, in accordance with plan documents;" that the specific plan document language conferred "discretionary authority" on the employer; and that the employer "as plan administrator, has a fiduciary duty to credit… compensation that is required to be credited under the terms of the plan." (63 EBC at 1282-1383.) Because of the early procedural posture of the case, the court did not have to decide if there had been a violation of ERISA's plan document language and thus, did not reach the question of a specific remedy for a violation of § 404(a)(1)(D). It did note, however, the multiple available remedies for such a violation.

A § 404(a)(1)(D) plan document violation also often arises directly or indirectly in a DOL investigation. And, courts have held that even a "correction" that has been approved by the Internal Revenue Service under its EPCRS will not necessarily "clear" a breaching fiduciary in the eyes of the DOL (or a private litigant). See, e.g., Cross v. Bragg, 47 EBC 1784, 1792 (4th Cir. 2009).

[4] Section 409 of ERISA expressly provides that a breaching fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." It also provides for removal of a plan fiduciary in certain circumstances and authorizes the DOL to assess a 20% civil penalty against a breaching fiduciary in certain circumstances. (See ERISA 502(l).)

[5] Plaintiffs' other ERISA claim alleged that the clinic had failed to maintain accurate plan records under ERISA.

How can a fiduciary avoid Section 404(a)(1)(D) plan document duty violations?

Plan sponsors/fiduciaries can take some concrete steps to attempt to avoid violating their fiduciary plan document duties:

- First, plan fiduciaries should identify their governing plan documents. Sound simple? Not always. For example, which documents are the current plan documents? What about plans amendments that have never been signed — are they governing plan documents? Will other documents — such as an Investment Policy Statement, QDRO Policy, Loan Procedures,[6] divorce decrees affecting benefits and/or beneficiary designations[7] — be considered governing plan documents for purposes of § 404(a)(1)(D)? Plan fiduciaries should address these questions before they arise in a litigation/regulatory proceeding. They should also work with the sponsor and its advisors to explore ways to expressly demarcate the plan's "governing plan document and instrument" universe.

- Secondly, even when plan fiduciaries know the scope of governing plan documents, they have a § 404(a)(1)(D) duty to review the governing plan documents to determine if they comply with ERISA. If the documents are not compliant, following them may constitute a § 404(a)(1)(D) or other fiduciary breach.

- Third, plan fiduciaries should seriously consider whether the old adage "the less you say the better" might apply to plan documents. For example, a plan document that expressly calls for remittance of contributions "within two days of pay date," while providing certainty, puts plan fiduciaries at greater risk of violating § 404(a)(1)(D) than a plan document that sets no time period or requires remittance only when deferrals are "reasonably segregable." Similarly, a plan document that contains specific asset investment allocations, wholly apart from lacking the flexibility that fiduciaries may need to invest prudentially, boxes a fiduciary into the four corners of a plan document from a § 404(a)(1)(D) perspective. Keeping an eye on § 404(a)(1)(D) plan document duties when drafting and reviewing plan documents may prevent fiduciary headaches down the road. This is particularly important in the context of prototype plan documents as they have no drafting flexibility. Plan sponsors may want to consider using a "volume submitter" type of pre-approved document (rather than a prototype) so that there is at least some opportunity (albeit minor) for customization.

Please feel free to contact our firm for help with any of these steps or other questions.

[6] For example, in Dardaganis v Grace Capital, Inc., 664 F. Supp. 105 (S.D.N.Y. 1987), affirmed, 889 F.2d 1237 (2nd Cir 1989), the district court characterized a fiduciary's failure to follow an Investment Management Agreement as a violation of the plan document duty.

[7] The Supreme Court, in Kennedy v. Administrator for DuPont Savings and Investment Plan, 129 S. Ct. 865 (2009), although not expressly addressing a § 404(a)(1)(D) violation, held that a divorce decree waiver was not effective to vary the terms of a plan document. The Ninth Circuit in Becker v. Williams, 777 F3d 1035 (9th Cir. 2015), did expressly address § 404(a)(1)(D) finding that a beneficiary designation form is not a governing plan document and thus, the failure to follow it was not a violation of § 404(a)(1)(D).)

IRS "Simplifies" User Fees for Voluntary Compliance Program

Douglas Van Galder, ERPA, QPA

With the recent issuance of Revenue Procedure 2018-4, the IRS surprisingly announced: "Effective January 2, 2018, the IRS simplified the user fees charged for most submissions made under the Voluntary Compliance Program (VCP)." The VCP falls under the IRS' Employee Plans Compliance Resolution System (EPCRS) and provides a very valuable means for retirement plan sponsors to get approval for the voluntary correction of operational and documentation errors that put their plan's favorable tax-qualified status at risk. As is the case under most simplification scenarios, however, there are winners and there are some — likely unintended — losers.

As the *Building Block* that is included with this issue of the Newsletter illustrates, the new applicable user fee is based on net plan assets as of the end of the plan year which is typically determined from its most recently filed Form 5500-series return. Under prior IRS Revenue Procedures, user fees were based on the number of plan participants as of the end of the plan year and there were significantly reduced fees for specified failures. This change in methodology means that large retirement plan sponsors will likely pay significantly less to correct plan failures under the VCP, but "small" plan sponsors will likely pay more and the discounted fees were eliminated altogether. The following examples illustrate these points:

Large Plan – Over $10M in Net Plan Assets: New VCP user fees are capped at $3,500, whereas, 2017 user fees would have been $5,000 if greater than 100 participants, $10,000 if greater than 1,000 participants or $15,000 if greater than 10,000 participants — **reductions** of $1,500, $6,500 or $11,500 (over 76% lower), respectively.

Small Plan – Over $500K to $10M in Net Plan Assets: New VCP user fees of $3,000, whereas, 2017 user fees would have been $1,500 if 51-100 participants, $750 if 21-50 participants or $500 if 20 or fewer participants — **increases** of $1,500, $2,250 or $2,500 (500% additional cost), respectively.

Small Plan – $500K or Less in Net Plan Assets: New VCP user fees of $1,500, whereas, 2017 user fees would have been $1,500 if 51-100 participants, $750 if 21-50 participants or $500 if 20 or fewer participants — **increases** of $0, $750 or $1,000 (200% additional cost), respectively.

NO Reduced VCP User Fees For: Late adoption of interim amendments (was only $375), other untimely non-amender failures, certain participant loan failures (previously $300 for up to 13), operational failures involving required minimum distributions (previously $500 for up to 150 participants affected), submissions for SEPs, SARSEPs and SIMPLE IRAs (previously $250) or submission related to a request for a minor modification of a previously issued VCP compliance statement.

Even with the increased cost for smaller plans and the elimination of reduced user fees for the specified failures, obtaining a compliance statement from the IRS by utilizing the VCP may still be far superior to the penalties and interest that could be assessed by the IRS if the plan were to be audited. In addition, most fiduciary liability policies will cover the IRS user and professional services fees (including the legal fees necessary for submitting under the VCP).

Please feel free to contact our Firm if you would like to discuss any of the foregoing information in greater detail.

Building Blocks of ERISA

Voluntary Correction Program (VCP) Fees Effective January 2, 2018

This month's *Building Block* provides basic information about the fees charged by the IRS for filing a VCP.

Click here to view this month's Building Blocks of ERISA

Firm News & Events:

Alison Fay Chairs 2018 Joint TE/GE Council Annual Meeting

Alison Fay will chair the 2018 Joint TE/GE Council Annual Meeting to be held on February 22 and 23 in Baltimore, Maryland. The Joint Council is made up of five regional councils composed of employee benefits practitioners across the US. Representatives from the Internal Revenue Service, the Department of Labor Employee Benefit Security Administration, and the Pension Benefit Guaranty Corporation will attend. For more information about the meeting, see www.tegegulfcoast.org/events.

Boutwell Fay LLP Welcomes Milton Heber

We are pleased to announce Milton Heber has joined the firm as a Compliance Analyst in our Newport Beach, California office. Milton comes to us with a great depth of experience in this field, and some of you already know him well via the WP&BC and other industry affiliations. We are so pleased that he is bringing his expertise to our Firm!

Free CLE for In-House Counsel!

In-House Counsel are Invited to Attend the NAMWOLF 2018 Business Meeting

Sherrie Boutwell will be attending NAMWOLF's 2018 Business Meeting in sunny San Diego, CA from February 24 to February 27. Click here for more information.