ROBINSON & COLE LLP

Employee Benefits & Compensation

Second Cirucit Adopts 'Likely Prejudice' Standard for SPD Disclosure Challenges and Finds that SPD Must Contain Thorough Information Regarding Domestic Partner Affidavits

In Burke v. Kodak Retirement Income Plan and Committee, the Court of Appeals for the Second Circuit, which covers New York, Connecticut and Vermont, found that Kodak's Summary Plan Description for its Survivor Income Benefits Plan was insufficient and likely prejudiced a participant and his spouse beneficiary's claim for benefits. The participant, Kenneth Burke, lived with his future wife as a domestic partner for many years prior to their marriage. Mr. Burke died less than six months after the marriage and Mrs. Burke applied for survivor income benefits. Her application for benefits was denied because the Plan did not provide benefits to a spouse who had been married to a participant for less than a year. Although survivor income benefits were available to domestic partners as well as spouses, the Burkes had not filed a Domestic Partner Affidavit before their marriage, as required by the Plan. The Court noted that Kodak's combined SPD for all of its benefit plans contained numerous references to Domestic Partner Affidavit requirements for certain benefits, but notably did not mention a Domestic Partner Affidavit requirement for the Survivor Income Benefits Plan.

The Court stated that an SPD must contain information on any restrictions on benefits, and found that Kodak's SPD did not meet this requirement because of its failure to mention the Domestic Partner Affidavit requirement for survivor income benefits. Although some Circuits have required a participant or beneficiary to establish that he or she had read an SPD and relied on it to their detriment, the Second Circuit adopted a 'likely prejudice' standard which requires only that a participant or beneficiary was likely to have been harmed as a result of an inadequate SPD. This standard results in a presumption of prejudice in favor of a participant or beneficiary after it is determined that he or she is likely to have been harmed. The Court found that inadequate information regarding the Domestic Partner Affidavit likely led the Burkes to believe that the Affidavit was not required for the survivor income benefit and that Mrs. Burke had been prejudiced as a matter of law by the deficient SPD. Thus, the court found that she was entitled to benefits under the Plan.

This case highlights the importance of providing thorough and accurate information in an SPD. The ruling also makes it easier for participants to prevail in a claim based on a deficient SPD in the Second Circuit, as the 'likely prejudice' rule does not necessarily require that a participant or beneficiary establish that he or she actually relied upon the content of an SPD in making a decision regarding benefits.

Congress Acts to Restrict Regulations on Cash Balance Plan Conversions

The Treasury Department issued proposed cash balance plan regulations in 2002, but has not yet finalized those regulations. Congress is concerned about the portion of the proposed regulations governing the conversion of traditional defined benefit pension plans to cash balance plans. Both the United States Senate and the United States House of Representatives have voted to prohibit the Treasury Department from issuing final cash balance plan regulations. A compromise bill, which may bar Treasury from issuing regulations, but order Treasury to propose a legislative solution to the issue is expected to be passed by both houses shortly.

Connecticut Department of Insurance Addresses New COBRA Provisions

Connecticut employers that sponsor insured group health plans must comply not only with Federal COBRA, but also with the State of Connecticut continuation coverage requirements. In the past, the period of continuation coverage under the Connecticut law mirrored Federal COBRA. However, as we mentioned in our June edition of this newsletter, the period of continuation coverage in Connecticut has been changed in cases where group health plan coverage is lost due to a termination of employment, leave of absence or reduction in hours resulting from an employee's eligibility to receive Social Security income. In such cases, continuation coverage must be offered until the employee is eligible for Medicare coverage.

The Connecticut Department of Insurance clarified its position on the new law which has unintentional consequences affecting continuation coverage. In correspondence dated October 31, 2003, the Department stated that a person only has to be eligible for Social Security benefits to take advantage of this extension; he or she does not actually have to be receiving benefits or even to have applied for benefits. Also, contrary to the title of the law implementing this extension, the Department states that the law as currently written applies to any one who is eligible for Social Security benefits and loses coverage due to one of the events described above regardless of age. This means that, for example, a young married employee who loses his or her spouse and qualifies for Social Security survivor’s benefits has a right of continuation coverage under this provision and therefore would have to be offered continuation coverage, potentially for a considerable period of time (i.e., until he or she is eligible for Medicare). The Department also clarified that this law should be considered as an extension of COBRA, and the rules for administering COBRA should be followed to the extent possible.

The new law became effective October 1, 2003. The State Insurance Department apparently has taken the position that this new change applies to individuals covered by COBRA as of October 1, 2003, in addition to those who have a qualifying event on or after October 1, 2003.

PBGC Update

The PBGC requires the plan administrator of an underfunded plan to provide participants and beneficiaries with notice of the plan's funding status and the PBGC guarantee within two months after the due date of the Form 5500 for the prior year. The PBGC has released guidance for plan administrators on providing notices to participants in underfunded plans. A 2003 model participant notice is included in the guidance.

The PBGC has announced the maximum benefit guarantee for 2004. If a single employer defined benefit plan terminates in 2004, the maximum amount that the PBGC will guarantee for retirees who retire at age 65 will be $3,698.86/month, or $44,386.32 annually.

Year End Reminder for Sponsors of 401(k) Safe Harbor Plans

On or before December 1, 2003 sponsors of 401(k) safe harbor plans are required to provide written notice of the safe harbor provisions to participants for the plan year beginning January 1, 2004. The notice must:

- Describe how the safe harbor contribution is calculated under the plan (including levels of matching contributions, if any).
- State the conditions under which these and other plan contributions will be made and that the safe harbor contributions are fully vested.
- Note the type and amount of compensation that can be deferred under the plan.
- Explain the timeframes and administrative requirements of making salary reduction elections.
- Outline the withdrawal and vesting provisions of contributions under the Plan.
- Provide the name, address, and phone number of the contact person or office where the participant can obtain additional plan information

Mutual Fund Update

In a special edition of Benefits e-News, we described the current investigations of the mutual fund industry by both state and federal regulators. Since that issue was published, a number of mutual fund companies under investigation, and in particular Putnam Investments, have seen multiple large institutional investors elect to drop certain funds at the center of the investigations from their investment menus, or drop the mutual fund company altogether. Last week, Putnam settled a civil suit brought by the SEC for securities fraud. It has been reported by the press that two other companies under investigation, Alliance Capital and Charles Schwab, have also been negotiating settlements with the SEC. Many plan sponsors are keeping a close eye on the rapidly expanding investigations to ensure that the funds offered under their plan continue to be prudent investments for plan participants .

Are you compliant?

Compliance Watch

Participant contributions to employee benefit plans, such as 401(k) plans and cafeteria plans, are plan assets and must be deposited into a separate trust account within time frames established by the DOL. The failure to timely deposit participant contributions can be a violation of fiduciary duty and may be considered to be a prohibited transaction under ERISA. Additionally, the failure to timely deposit participant contributions in trust subjects the plan sponsor to an excise tax. The DOL's National Enforcement Project has focused audit efforts on compliance with this rule. Therefore, plan sponsors should continually monitor the transfer of participant contributions to trust to be sure that deposits are timely made.

Speaking Engagements

Bruce Barth, head of Robinson & Cole LLP's Employee Benefits and Compensation Group, will be presenting a Legislative and Regulatory Update at the December 4 meeting of the Hartford Chapter of the Worldwide Employee Benefits Network. He will address legal developments over the past year impacting employee benefits. WEB members and non-members may attend. To request a registration form, please contact cfeldmann@rc.com.

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