BENEFITS LITIGATION UPDATE

A Publication From Epstein Becker Green & The ERISA Industry Committee

Fall 2015 Issue 9

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Message from ERIC President and CEO Annette Guarisco Fildes:

Welcome to the Fall edition of Benefits Litigation Update, brought to you by The ERISA Industry Committee (ERIC) and the law firm of Epstein Becker & Green.

As we all know, judicial decisions strongly affect employee benefits policy and compliance. That is why, over the past few months, ERIC has been extremely active filing several amicus briefs and testifying before the U.S Court of Appeals.

On October 20, ERIC filed an amicus brief with the U.S. Supreme Court in *Alfred Gobeille v. Liberty Mutual Insurance Company* arguing that Vermont's law to require the reporting of health claims paid by self-funded benefit plans is preempted by ERISA.

ERIC also filed an amicus brief with the Supreme Court in *Fulghum et al. v. Embarq Corporation et al.* on September 30, arguing that the "fraud" exception to the six-year statute of repose that Congress included in ERISA does not apply to this case.

And, on October 6, in oral argument in *M&G Polymers USA, LLC, et al. v. Hobert Freel Tackett et al.* before the U.S. Court of Appeals for the Sixth Circuit (on remand from the U.S. Supreme Court), ERIC emphasized three principles of collective-bargaining-agreement interpretation that stem from the Supreme Court's decision. Earlier this year, ERIC also filed amicus briefs in two other post-Tackett cases.

I would like to thank the legal team at Epstein Becker & Green for their expert legal insights and for their impressive contributions to this issue of the Benefits Litigation Update.

As always, we welcome your feedback on this newsletter as well as the cases highlighted.

ERIC will hold a conference call discussing cases addressed in this issue on Tuesday, November 10, 2015 from 2:00 to 3:30 pm EST.

ERIC members and trial members can register for the call by clicking here. If you are a prospective member and would like to participate in the call, please contact ERIC at (202) 789-1400 or by email at memberservices@eric.org.

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FEATURED ARTICLES

Will A Third Wave of Suits Over The Contraceptive Mandate Bring The Culture Wars to Corporate Employee Benefits?

By John Houston Pope, Member of the Firm in the Employee Benefits, Litigation, and Labor and Employment practices

Large, public employers have thus far been bystanders to the recent heated controversy over the contraceptive mandate imposed pursuant to the Affordable Care Act (ACA). This respite from the culture wars for corporate America may be nearing an end. Recent challenges to the contraceptive mandate involve employees who object to participating in health plans that offer contraceptives or abortion services. While the immediate target continues to be the federal program on contraceptive mandates, with the addition of a state employer, the purpose and logic of the suits suggest that another wave of litigation may embroil private employers in this growing dispute.

In *Wieland v. U.S. Department of Health & Human Services*, 793 F.3d 49 (8th Cir. 2015), the Eighth Circuit reinstated a lawsuit filed by a member of the Missouri state legislature who objected on religious grounds to paying for or participating in a health plan that included coverage for contraceptives or that provided such coverage to his daughters. He wants to opt out of coverage for contraceptives entirely, relying on a Missouri state law that entitled an employee to assert religious beliefs or moral convictions to do so. The Eighth Circuit suggested that the Supreme Court's opinion in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) had recognized the substantiality of the religiously based right asserted by the plaintiff.

In a federal district court case from Vermont, *Howe v. Burwell*, 2015 U.S. Dist. LEXIS 94595 (D. Vt. July 21, 2015), an exchange participant raised an objection to abortion coverage. The plaintiff in *Howe* did not qualify for coverage through his job. He objected to the offerings available on his state exchange because all of them collected and segregated a portion of a participant's premium for non-federally funded abortion services. (Insurers on the exchange may, but are not required, to offer coverage for such services.) The court upheld continued prosecution of the part of his claim that asserted that he is entitled to a religious accommodation under the federal Religious Freedom Restoration Act (RFRA) that will permit any health insurer from whom he obtains health insurance coverage to refrain from collecting a separate payment from him.

These lawsuits carried forward the focus from *Hobby Lobby* of directly attacking the ACA by using the federal RFRA. The federal RFRA, however does not provide an individual with any rights against a private party. How, then, can this movement to object to contraceptive coverage infiltrate corporate employee benefit programs?

One route may be through state RFRAs. Twenty-one states have these laws. Like the federal law, most do not apply to disputes between private persons or corporations. However, recent revisions of these statutes to expand the religious accommodation afforded to individuals who object to providing services in support of same-sex marriages may have eroded the lines. For example, Indiana, like Arkansas and Mississippi, originally included a provision in its state RFRA that said, "Nothing in this act shall create any rights by an employee against an employer if the employer is not the government." The revision of Indiana's law in April deleted this provision. Arkansas did the same. One implication of these changes is that state RFRAs now may play a role in determining employer obligations.

A more direct route can be traced through the requirement for religious accommodations found in federal and state anti-discrimination laws. Title VII of the Civil Rights Act of 1964 requires employers to provide reasonable accommodations for religious beliefs and practices. Most state anti-discrimination statutes contain similar requirements. New York, for example, does so, but places a higher burden on employers to demonstrate that a requested accommodation is not reasonable than does federal law.

Under Title VII, courts have accepted a wide range of claims for religious accommodation related to sincerely-held religious beliefs about contraception and abortion. Pharmacists have been exempted from having to dispense emergency contraceptives (Plan B). Employees have contested payment of an agency fee to a union that then contributed to an organization that supported abortion. These types of successful challenges in the workplace suggest that, combined with *Hobby Lobby*'s recognition of the religiously based right to avoid participation in the contraceptive mandate, employees may be able to mount challenges to an employer's offering of a health plan that complies with the mandate but which does not offer an opt-out option on contraception or abortion.

Employers and plan sponsors should begin to plan their responses for this potential wave of lawsuits now. Can these objectors be accommodated? At what price? The legal principles applicable to religious reasonable accommodation claims weigh the burden and cost to the employer, as well as the available alternatives, in determining what would be reasonable. If accommodation can be easily done, employers should be ready to respond promptly and effectively to requests. If accommodation would be difficult, burdensome, or expensive, then employers should be prepared to explain that fact to requesting employees and to defend that explanation in court.

Take Aways:

Employers and plan sponsors should carefully monitor participant objections to contraceptive coverage and be prepared to proactively respond. Although it may not be possible to deny a covered benefit and continue to comply with the contraceptive coverage mandate, plan sponsors should plan for effective communication with the objecting plan participant.

Okun v. Montefiore: Are Your Severance Policies Subject to ERISA?

By Gretchen Harders, Member of the Firm in the Employee Benefits practice

On July 17, 2015, the Second Circuit published its decision in *Okun MD v. Montefiore Medical Center*, 215 WL 4385294 (2nd Cir. 2015) finding that Montefiore's informal severance policy constituted an ERISA severance plan. In remanding the case to the District Court for a decision on the merits of plaintiff's claim for severance benefits, the Second Circuit again opened up the question for employers of whether the use of informal severance policies creates significant litigation risk.

Dr. Okun had worked as a physician with Montefiore Medical Center since 1988 and was terminated for cause on the basis of statements he made to a guest speaker. Dr. Okun alleged that his termination for cause was a pretext to deny him benefits under Montefiore's severance policy after he gave notice of his resignation. In support of his claim, Dr. Okun asserted federal court subject matter jurisdiction based on the allegation that Montefiore's severance policy constituted an employee welfare benefit plan governed by ERISA.

Montefiore has provided severance since 1987 and maintained a severance policy that had been in place in its current form since 1996. The Montefiore severance policy provided that physicians who were hired before a certain date and who were terminated without cause would be entitled to a twelve months' notice period or six months' severance pay as elected by the physician. The hospital's Medical Director is required to review the amount of severance for any physician with more than fifteen years of service. The policy provided that it may be changed, modified or discontinued at any time. There were no other conditions to eligibility or any ongoing administrative obligations.

The Second Circuit applied the test of whether an ERISA severance plan existed under *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 76 (2nd Cir. 1998), that is: (i) whether the commitment requires managerial discretion in its administration; (ii) whether a reasonable employee would perceive an ongoing commitment to provide employee benefits; and (iii) whether the employer was required to analyze the circumstances of each employee's termination separately in light of the circumstances.

The Second Circuit concluded that the employer was required to determine whether a physician was terminated for cause and whether severance should be increased for long-term employees, thus requiring an individualized determination. The Second Circuit noted that the Montefiore policy represented a multi-decade commitment to provide severance benefits. Finally, though noting that there was more limited managerial discretion under the Montefiore policy than under *Schonholz* and similar cases in the Second Circuit, the discretion to determine whether a termination was for cause and the right to increase severance was sufficient to establish discretion.

The Second Circuit rejected the District Court's conclusion that the Montefiore policy provided significantly less discretion than other severance policies found to be ERISA severance plans. The Second Circuit also did not address the formula used to determine benefits, which the District Court noted was formulaic and, other than the Medical Director's review for long-service physicians, mechanical. Though the District Court noted the reservation of rights clause allowed termination of the program at any time as evidence that an ongoing administrative program did not exist, the Second Circuit rejected that notion and concluded that many severance plans subject to ERISA maintained a reservation of rights clause. A significant factor for the Second Circuit was that the severance policy had been in place for many years, even decades, despite the right to discontinue the policy at any time and therefore it should be considered an ongoing administrative program.

The Montefiore decision illustrates the difficulties employers face in providing severance pay through informal policies to their workforce. Many employers have implemented a myriad of severance arrangements that are intended to provide short term assistance to former employees who have lost their jobs. As a policy matter, most employers do not pay severance to employees terminated for cause. When an employee is terminated and not made eligible for benefits under an informal severance policy, an employee may be more likely to sue where there is the possibility of asserting an ERISA claim. The longer the policy has been in place, the more likely a court is to find there to be an "ongoing" administrative program.

Take Aways:

In light of the Montefiore decision, employers should take this opportunity to review their severance practices and policies carefully, paying close attention to any documentation and historical practice that could rise to managerial discretion under ERISA severance plan guidance.

NOTEWORTHY PENDING CASES

The House of Representatives Challenges the ACA in Court

By [Frank C. Morris, Jr.,] Member of the Firm in the Litigation and Employee Benefits practices

Once again, a lawsuit threatens the Affordable Care Act (ACA). House Republicans filed a lawsuit against the President in November 2014 claiming that the ACA was not being faithfully enforced. The challenge is based on the ACA's cost-sharing reductions and, specifically, the requirement that insurers reduce cost sharing for individuals and families with incomes below 250 percent of the federal poverty line. Under the current implementation of the ACA, the Department of the Treasury reimburses insurers for these reductions. Because the ACA does not explicitly appropriate funds for the Treasury to reimburse insurers for cost reductions, the challengers argue that the current implementation is unconstitutional because Treasury is nonetheless making these payments to insurers.

The challengers earned a victory on September 9 when the United States District Court for the District of Columbia held that the House does have standing to pursue the constitutional claims regarding spending of funds not appropriated by Congress. The administration has vowed to appeal this ruling.

Should the lawsuit be successful, insurers would be required to reduce cost sharing but may not be able to collect reimbursement funding, potentially leading to a possible "death spiral" where insurers must raise premiums in order to make up for the lost reimbursement funds, causing people to leave the market for insurance altogether.

Increased Litigation Risks for Fraudulent Concealment Fiduciary Breach Claims

By John Houston Pope, Member of the Firm in the Employee Benefits, Litigation, and Labor and Employment practices

Claims for breach of fiduciary duty under ERISA must be brought within the earlier of three years of the date of actual knowledge of the breach (a statute of limitations) or six years from the date of the act or omission constituting the breach (a statute of repose), except when fraud or concealment occurs. This last phrase may exempt claims from limitation of any kind for potentially an indefinite period of time. Its construction, then, holds considerable importance for plan fiduciaries.

In *Fulghum v. Embarq Corp.*, 785 F.3d 395 (10th Cir. 2015), the U.S. Court of Appeals for the Tenth Circuit concluded that this exception comes into play when the alleged fiduciary breach involves allegations that the fiduciary engaged in fraud. In *Fulghum*, a group of retirees asserted that the fiduciary defendants misrepresented the terms of various health and welfare plans and misled them into believing their health and life insurance benefits could not be amended or terminated. This theory of their claim, in the court's view, allowed them to use the exception to avoid the bar of the statute of repose.

Under the *Fulghum* rule, which also is embraced by the Second Circuit, active fraud or knowing nondisclosure can invoke the exception and extend the statute of limitation and statute of repose indefinitely. The five other Circuits apply the exception only when the fiduciary takes steps to conceal a breach.

The significant split among the federal appellate courts prompted Embarq to seek review in the U.S. Supreme Court. A petition is now pending.

Coming Attractions: Data Breach Litigation Targeting Employers

By Nathaniel M. Glasser, Member of the Firm in the Labor and Employment practice and Adam C. Solander, Member of the Firm in the Health Care and Life Sciences practice

In a case emphasizing the need for employers to focus on data security, Sony Pictures Entertainment has agreed to settle a lawsuit filed by nine former Sony employees who alleged that the company's negligence caused a massive data breach. *Corona v. Sony Pictures Entm't, Inc.*, Case No. 2:14-cv-09600 (C.D. Ca. June 15, 2015). The plaintiffs claimed Sony failed to implement and maintain adequate security measures to protect its employees' personally identifiable information ("PII"), and then improperly waited at least three weeks to notify plaintiffs that their PII had been compromised. The settlement could cost Sony up to $8 million.

In November 2014, Sony was the victim of a cyber-attack, possibly related to the production of a movie that parodied North Korean leader Kim Jong Un. According to the complaint, the hackers stole nearly 100 terabytes of data, including sensitive PII of at least 15,000 current and former Sony employees and then posted this information on the Internet, using it to threaten individual victims and their families.

This case and resulting settlement highlights several important lessons for employers. First, employers must understand where sensitive HR data resides and audit their environment for security vulnerabilities. To protect against social engineering attacks—like the Sony breach and nearly all other recent breaches—employers should train their workforces on information security best practices. Employers should formulate and implement a breach response plan to be able to immediately respond to a breach and to minimize the time from the discovery of the compromise to the notification of affected persons. If a data breach does occur, the company should immediately execute the data breach response plan and quickly investigate the nature and scope of the data breach.

NOTEWORTHY RECENT DECISIONS

LeBlanc v. SunTrust Bank: Beware the Payroll Practices Exemption under ERISA

By [Kenneth J. Kelly], Member of the Firm and Chair of the National Litigation Steering Committee

The recent decision in *LeBlanc v. SunTrust Bank*, 2015 WL 5038032 (M.D. Tenn. 8/25/15) illustrates the consequences of reliance on the "payroll practices" exemption. Under the "payroll practices" exemption, payments by an employer of an employee's "normal compensation" made in order to continue the employee's income during an absence due to physical or mental illness (disability payments), will not constitute an "employee welfare benefit plan" governed by ERISA if the source of the payments is the employer's general funds. 29 C.F.R. § 2510-1(b) (2).

SunTrust Bank had a "payroll practice" to pay its disabled employees their usual compensation for up to six months until their long-term disability coverage under an ERISA plan started. The plaintiff brought a common law contract lawsuit for such short term disability payments, and as with any such contract claim, sought foreseeable consequential damages. Such damages, plaintiff argued, included an amount equal to the long-term disability benefits she would have been eligible for under the ERISA plan, but which she was denied. The court held that merely because plaintiff's consequential damages were measured by reference to the LTD plan terms, did not transform the case into a denial of plan benefits governed by ERISA.

Employers may elect to offer benefits to employees paid from the employers' general funds in order to be relieved of the reporting and fiduciary burdens imposed on ERISA plans. If they do so, however, any state law contract or tort litigation arising from the denial of such benefits will not be preempted by ERISA. The effects of the unavailability of ERISA preemption can be significant; not only do employers lose the possible deferential treatment under ERISA of the denial of claims, employees may succeed in suing for damages well in excess of the value of the denied payroll practice benefit. Hence, employers should carefully weigh the benefits against the possible risks when considering establishing such "payroll practices" benefit programs.

Please send questions, comments, and related requests to Gretchen Young, Gretchen Harders or Adam C. Solander.