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Five Provisions to Reduce ERISA Litigation Risk

Plan Sponsors Can Significantly Limit Threats, Cost of Claims by Ensuring Plans Include These

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In a number of recent cases, courts have reminded litigants and practitioners that the focal point of any lawsuit under ERISA for benefits purportedly owed under the terms of an employee benefit plan is the plain language of the plan itself. As the U.S. Supreme Court has noted on several occasions, "The plan, in short, is at the center of ERISA."

The courts' continued tendency to see ERISA plans as quasi-contractual enables plan sponsors to dictate a variety of favorable litigation "ground rules" that participants must abide by in the event that they file suit for benefits under the plan. By ensuring that ERISA-covered plans include the following five provisions, plan sponsors can significantly limit the risks and costs associated with ERISA benefit claims litigation.

1. Ensure a Deferential Standard of Review

Any discussion of the extent to which plan sponsors can tip the ERISA litigation scales in their favor must begin with the Supreme Court's 1989 decision in *Firestone Tire & Rubber Co. v. Bruch.* In *Firestone,* the Court addressed a simple, yet fundamentally important, question: What standard of judicial review applies to benefit determinations under ERISA?

Noting that the statute itself did not provide an answer, and rejecting the lower courts' reliance on the Labor Management Relation Act's arbitrary and capricious standard, the Court turned to the common law of trusts for guidance. Under trust law, the Court found, the standard of review depends upon whether the trust instrument gives the trustee discretion to construe disputed or doubtful terms. If it does, courts must defer to the trustee's interpretation of plan terms and benefits eligibility decisions as long as they are not an abuse of discretion. If it does not, a de novo standard of review applies.

Not surprisingly, the Supreme Court's decision sent plan sponsors scurrying to amend their plans to vest plan administrators with discretion to interpret plan terms and decide claims for benefits. So-called *Firestone* language is now a fundamental part of every prudently drafted ERISA plan, and has become the first thing ERISA litigators look for when evaluating claims for benefits.

2. Avoid Exceptions to the Administrative Exhaustion Requirement

It is in plan sponsors' interest to ensure that participants exhaust the administrative claims procedures that all ERISA plans are required to provide. Even when a plan includes carefully drafted *Firestone* language, the courts' willingness to defer to plan administrators' determinations as to benefits depends upon participants actually exhausting their plan's administrative remedies.

Furthermore, exhaustion of administrative remedies provides plan administrators with the opportunity to review and resolve potentially meritorious claims before participants commence costly litigation. Finally, if litigation does ensue, in most cases discovery will be limited to the record before the plan administrator, and its decision will be reviewed under the more favorable abuse of discretion standard.

In the past, plan sponsors may have been able to rely on the "judge-made" exhaustion requirement that most courts had applied regardless of whether exhaustion was required under the plan, but that is no longer the case. For example, last year the 9th U.S. Circuit Court of Appeals held in *Spinedex Physical Therapy v. United Healthcare of Arizona* that unless expressly required by the plan terms, participants are not required to exhaust their administrative remedies before filing suit.

Similarly, in 2013 the 2nd Circuit held in *Kirkendall v. Halliburton Inc*. that "where a plaintiff reasonably interprets the plan terms not to require exhaustion and, as

See *ERISA Litigation Risk*, p. 2

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a result, does not exhaust her administrative remedies, the case may proceed in federal court." Cases such as *Spinedex* and *Kirkendall* illustrate the courts' increased willingness to allow participants to circumvent their "judge-made" exhaustion requirement, and the importance of including clear language requiring exhaustion in the plan document itself.

3. Limit the Deadline for Participants' Suits

ERISA does not provide a statute of limitations applicable to participants' claims for benefits. As a result, courts borrow the limitations period applicable to the most analogous state-law claim — typically the limitations period for breach-of-contract claims. However, state statutes of limitations are often lengthy, and expose plans to lawsuits years after participants' claims accrue. Additionally, the significant differences in various states' limitations periods undermine ERISA's goal of promoting uniform plan administration.

In light of the problems associated with relying on a panoply of different state statutes of limitations, many plan sponsors have taken matters into their own hands by incorporating limitations periods directly into their plans. In a 2013 decision, *Heimeshoff v. Hartford Life & Accident Ins. Co.,* the Supreme Court upheld the use of such "plan-based" statutes of limitations. Construing a plan document as a type of contract between the plan sponsor and participant, the Court noted the importance of enforcing plan terms as written. It found that, as is the case with any contract, parties may agree to private limitations periods as long as these are not "unreasonably short" and do not violate a "controlling statute." While the Court did not specify at what point a limitations period becomes "unreasonably short," it did hold that such provisions do not violate ERISA. Following *Heimeshoff,* plan sponsors should make certain that their plans include reasonable limitations and accrual periods for filing suit.

4. Control the Place Where Participants Can Sue

Not only do plan sponsors often include limitations periods that dictate when participants can file suit, many also include venue selection clauses limiting where litigation can be filed. By including a venue selection clause in their plans, plan sponsors can ensure that challenges over plan administration and benefits decisions proceed in a convenient forum. A majority of courts have upheld ERISA plan venue selection clauses.

In fact, some courts, such as the 6th Circuit, have held that venue selection clauses further ERISA's goals of ensuring uniform decision-making and minimizing plan sponsors' administrative costs. While other courts disagree, finding that venue selection clauses are inconsistent with ERISA's own venue provisions, the Supreme Court's *Heimeshoff* decision, upholding plan-based limitation periods and recognizing the importance of enforcing ERISA plan terms "as written," lends strong support for the majority view upholding ERISA plan venue selection clauses.

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5. Prohibit the Assignment of Claims

In addition to designing plans with built-in limitations periods and venue selection clauses that restrict when and where participants can file suit, it is important for plan sponsors to take steps to prevent plaintiffs from circumventing ERISA's limitations on who can file suit. While ERISA provides that benefit claims may be brought only by plan participants or beneficiaries, most courts uphold participants' and beneficiaries' assignment of their claims to third parties, such as doctors and other health care providers.

As the recent surge in benefit claims litigation filed by doctors challenging their insurance reimbursements illustrates, allowing the assignment of claims exposes plans to an increased risk of suit by a broader range of plaintiffs.

Assignment of claims is not prohibited by ERISA, but neither is it an absolute right. Many courts have upheld the anti-assignment provisions plan sponsors have included in their ERISA plans. As the 11th Circuit succinctly stated in 2004 in *MultiSpecialty Group v. Health Care Plan of Horton Homes Inc.*: "Because ERISA-governed plans are contracts, the parties are free to bargain for certain provisions in the plan — like assignability. Thus, an ambiguous antiassignment provision in an ERISA-governed welfare benefit plan is valid and enforceable."

See *ERISA Litigation Risk*, p. 3

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Conclusion

Avoiding litigation should be plan sponsors' primary goal, but prudent plan drafting goes beyond mere risk avoidance. The take-away from recent Supreme Court and appellate court ERISA decisions is that employers have considerable freedom to design plans that enable them to control unnecessary, stale, protracted and frivolous litigation. By including these provisions in their plans, employers can rest assured that they will be in the best position possible to efficiently and favorably resolve any suits filed.

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