WHAT EVERY ERISA LAWYER SHOULD KNOW ABOUT ERISA LITIGATION

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I. What is an ERISA Plan? See ERISA §§1(1)-(3).

A. A “plan, fund, or program”:

1. Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) (“a ‘plan, fund or program’ under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.”).

2. An ERISA plan can cover only a single employee. E.g., Williams v. Wright, 927 F.2d 1540, 1545 (11th Cir. 1991).

3. An ERISA plan does not have to be funded. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 18 (1987) (“[A]n employer . . . should not be able to evade the requirements of the statute merely by paying . . . benefits out of general assets”).

4. However, an ERISA plan must involve some sort of administrative procedure; arrangements providing for a single lump sum payment without any eligibility determinations are not ERISA plans. Fort Halifax Packing Co. v. Coyne, 482 U.S. at 15 (state statute requiring lump sum severance payments to employees displaced by plant closing does not involve creation of an ERISA plan); Angst v. Mack Trucks, Inc., 969 F.2d 1530, 1538-39 (3d Cir. 1992) (union agreement providing for lump sum severance payments to employees who give up their guaranteed jobs does not create an ERISA plan, even though the employees would be eligible for continuing benefits under pre-existing medical plan).

B. “established or maintained by an employer or by an employee organization”:

1. Certain “employers” are not subject to ERISA, such as governments and churches (including church-run hospitals or schools).

2. Does the “bare purchase of insurance” constitute an establishment or maintenance? The better view is that it does, if the employer contributes toward the cost of the plan. Only one case has found otherwise: Taggart v. Life & Health Benefits Admin. Inc., 617 F.2d 1208 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981). However, that case has been repudiated in its own circuit and others. Kidder v. H&B Marine, Inc., 932 F.2d 347, 353 (5th Cir. 1991); International Resources v. New York Life Ins., 950 F.2d 294, 297 (6th Cir. 1991), cert. denied, 112 S. Ct. 2941 (1992); Wickman v. Northwestern Nat. Ins. Co., 908 F.2d 1077, 1083 (1st Cir.), cert. denied, 111 S.Ct. 581 (1990); Brundage-Peterson v. Comcare Health

C. Covering “participants or their beneficiaries” (in the case of a welfare plan) or “providing retirement income to employees” or “results in a deferral of income by employees . . . to the termination of covered employment or beyond” (in the case of a pension plan).


2. Self-employed individuals are not employees, so plans covering only self-employed individuals are not subject to ERISA. 29 C.F.R. §2510.3-3. But self-employed individuals and their families are covered by ERISA benefit plans when those plans include common law employees. Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 124 S. Ct. 1330 (2004).

3. 29 C.F.R. §2510.3-3 indicates that a plan covering only shareholder-employees of a corporation and their families is not subject to ERISA. Whether this will survive Darden and Yates is uncertain.

D. Providing Welfare or Pension Benefits Subject to ERISA

1. Pension plan provides deferral of income to termination of employment or beyond. Thus, a plan deferring income for a fixed number of years is not subject to ERISA. 29 C.F.R. §2510.3-2(c); McKinsey v. Sentry Ins. Co., 986 F.2d 401 (10th Cir. 1993).

2. 29 C.F.R. §2510.3-2(b) distinguishes between pension plans and severance plans (which are considered welfare plans).

3. All pension plans are subject to ERISA except for “excess benefit plans.” An excess benefit plan provides benefits that would otherwise be provided under a tax-qualified ERISA plan, but for the Code §415 limits. Now, most executive benefit plans that used to be excess benefit plans no longer fit this definition, because they have been amended to make up benefits lost by reason of the maximum income inclusion rules applicable to tax-qualified plans.

4. Other pension plans covering a “top-hat” group of highly compensated employees are subject to ERISA, but are not subject to ERISA’s fiduciary, vesting, or funding rules. Also, they are eligible for alternative reporting and disclosure requirements. Is your top-hat plan really a top-hat plan? Carrabba v. Randalls Food Markets, Inc, 1999 WL 118200 (N.D. Tex. Feb. 18, 1999), aff’d without opinion, No. 00-10520 (5th Cir. May 22, 2001).

5. Welfare benefit plans are plans providing the following types of benefits: medical, surgical, hospital care, sickness, accident, disability, death, unemployment, severance,
vacation, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services, or any other benefit described in §302(c) of the LMRA, 29 U.S.C. §186(c).

6. BUT ERISA does NOT cover “payroll practices” even if they provide benefits for a purpose listed in ¶5. Massachusetts v. Morash, 490 U.S. 107 (1989). Thus, vacation pay, short-term disability (sick pay), and on-premises first-aid centers usually are not subject to ERISA. 29 C.F.R. §2510.3-1(b).


II. Types of Claims Under ERISA

A. Claims for Benefits - ERISA §502(a)(1)(B)

1. Can be brought by a participant or beneficiary.

   a. A participant is any employee or former employee who is or may become eligible to receive a benefit, or whose beneficiaries may become eligible to receive a benefit. See above at ¶I(C)(2), regarding whether a self-employed individual can be a participant.

   b. In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989) the Court held that a participant includes a former employee who has a reasonable expectation of returning to covered employment or who has a colorable claim to vested benefits. See also, Daniels v. Thomas & Betts Corp., 263 F.3d 66 (3d Cir. 2001) (deceased participant’s wife had standing to pursue statutory penalties as beneficiary, because she had a reasonable basis for believing she was entitled to benefits based on what her husband had told her).


4. Where the claims procedure is exhausted, the decision of the plan administrator will be reviewed on an “abuse of discretion” standard if the plan grants discretion
to the plan administrator to make the challenged determination. Firestone Tire & Rubber Co. v. Bruch, 109 S. Ct. 948 (1989); Abanathya v. Hoffman-La Roche, 2 F.3d 40 (3d Cir. 1993). But see, Heasley v. Belden & Blake Corp., 2 F.3d 1249 (3d Cir. 1993) (court finds that plan did not contain a clear and unequivocal grant of discretionary authority, and applies doctrine of contra proferentem to hold that a de novo review is warranted); Luby v. Teamsters Pension Fund, 944 F.2d 1176 (3d Cir. 1991) (discretionary authority limited to plan interpretation, not applicable to determination of disputed fact).


B. Fiduciary Breach Claims

1. Participants, beneficiaries, other fiduciaries, and the Department of Labor may sue a fiduciary for breach of fiduciary duty under ERISA.

2. Section 502(a)(2) authorizes suit for appropriate relief under §409 of ERISA, which generally is limited to the restoration of losses sustained by the plan as a result of the breach. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985). Milofsky v. American Airlines, Inc., No. 03-11087 (5th Cir. March 16, 2005) held that participants in individual account plan cannot sue under §502(a)(2) for relief on behalf of the plan, where what they seek is restoration of losses incurred by the individual accounts invested in certain investment options, rather than a recovery for the plan as a whole.

3. The Supreme Court recently held that participants and beneficiaries who are injured personally by a breach that does not otherwise damage the plan have standing to sue under §502(a)(3) for appropriate equitable relief to remedy the breach. Varity Corp. v. Howe, 116 S. Ct. 1065 (1996). See also, Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292 (3d Cir. 1993). The definition of “equitable relief” is less than clear. See Great West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), holding essentially that money damages are not available under §502(a)(3); Mertens v. Hewitt Associates, supra; In re Unisys Corp. Retiree Health Litigation, 57 F.3d 1255 (3d Cir. 1995) (retroactive restoration of retiree medical benefits).

4. The Department of Labor may sue to collect civil penalties under §502(i) and §502(l) for prohibited transactions (not otherwise subject to excise taxes), or for a 20% penalty on the amount recovered by the Department in litigation or settlement.

5. Former participants in a terminated defined benefit plan have a special right to sue a plan fiduciary for breach of fiduciary duty in the purchase of plan termination annuities. Recovery is limited to “appropriate relief... to assure receipt” of the promised benefits. ERISA §502(a)(9).