GOING ABOV AND BEYOND:

ERISA Disclosures

by | **Emma Franklin** and **John Schembari**

ERISA sets out disclosure requirements for employee benefit plan fiduciaries, but multiple court decisions demonstrate that fiduciaries may need to go above and beyond those requirements when providing notices and benefits information to plan participants.

The Employee Retirement Income Security Act of 1974 (ERISA) imposes rigorous duties on employee benefit plan fiduciaries. However, only going by the book when providing notices and benefits information to plan participants may not be sufficient in some instances, as benefits-related litigation has demonstrated over the years.

The ERISA standard of acting "with the care, skill, prudence, and diligence" of a prudent "expert" can be difficult to determine in situations that require more than following the statutory rules outlined in ERISA or the Internal Revenue Code. That's partly because ERISA's prudence standard requires consideration of *all relevant facts and circumstances,* while statutory requirements simply set the floor of a fiduciary's duty.

The following four distinct categories give rise to disclosure-related fiduciary duties. Each category requires some level of disclosure and brings its own unique set of challenges to ERISA fiduciaries.

1. Statutory Disclosure Requirements

Plan fiduciaries owe myriad disclosure obligations to participants and beneficiaries under law. For example, ERISA requires the distribution of summary plan descriptions (SPDs), summaries of material modifications (SMMs), periodic benefits statements, summary annual reports, retirement plan fee disclosures, Consolidated Omnibus Budget Reconciliation Act (COBRA) notices and blackout notices, to name just a few.

Statutory disclosures are among the most straightforward obligations that fiduciaries must meet since explicit delivery and timing procedures are typically outlined in Department of Labor (DOL) and Internal Revenue Service (IRS) regulations. Nevertheless, fiduciaries encounter issues with statutory requirements when disclosures are not timely distributed, are not written in a manner to be understood by average participants or are not delivered due to administrative errors. While statutory disclosures are generally a high priority for fiduciaries, system failures and technical deficiencies can elicit statutory penalties under ERISA, taxes and steep litigation costs. For example, over the last several years, plaintiffs have increasingly instigated class action lawsuits attacking technically deficient, late or missing COBRA notices, and some have resulted[1] in settlements north of $1 million.[2]

2. Information Requests

In all circumstances, fiduciaries cannot mislead participants about their benefits, but they are held to an elevated standard when a participant specifically requests information. They must provide complete and accurate information concerning the information requested, a duty that derives from the general duty of prudence under ERISA Section 404(a)(1)(B).[3]

The following two cases illustrate how the plan sponsor or administrator can be held liable in certain circumstances when they or their agents convey inaccurate and misleading statements about plan benefits.

Bowerman v. Wal-Mart Stores, Inc.[4]

Tamyra Bowerman worked in a Walmart photo lab, terminated employment for one month and was then rehired. The medical plan required employees to work for 90 days consecutively to be eligible for benefits, and employees could not receive benefits for preexisting conditions until they worked for 12 consecutive months. Rehired employees could waive the 90-day waiting period and join the plan immediately upon rehire, but the plan did not waive the 12-month preexisting condition limitation period for rehires (unless the employee elected COBRA between termination of employment and rehire).

In this case, Bowerman planned to elect COBRA coverage for the short period of time she was not employed at Walmart. When she asked the Walmart administrative assistant tasked with benefit plan enrollment whether she still needed to pay for COBRA coverage for the one-month hiatus, he incorrectly told her she did not. When the plan denied claims related to pregnancy treatment, Bowerman spoke with the plan's service center, and the representative told her the problem would be fixed. Later, Bowerman discovered that the plan denied the pregnancy-related claims because the pregnancy was a

takeaways

- The Employee Retirement Income Security Act (ERISA) standard of acting "with the care, skill, prudence, and diligence" of a prudent "expert" can be difficult to determine in situations that require efforts beyond following the statutory rules outlined in ERISA or the Internal Revenue Code.
- Benefit plan fiduciaries encounter issues with statutory requirements when disclosures are not timely distributed, are not written in a manner to be understood by average participants or are not delivered due to administrative errors.
- Fiduciaries are held to an elevated fiduciary duty to provide complete and accurate information when a plan participant makes an inquiry about their benefits.
- Some federal courts acknowledge that fiduciaries have an affirmative duty to inform participants and beneficiaries of material information when there is a reasonable possibility that silence may be harmful.
- Employers have an enhanced fiduciary duty for disclosure when they give serious consideration to plan changes, such as those related to the adoption of retirement incentive or severance plans.

preexisting condition, and she had not worked for 12 months following rehire.

The Seventh Circuit held that Walmart breached its fiduciary duties by providing Bowerman incorrect information when she asked. The court reasoned that when plan documents are ambiguous, oral interpretations by authorized employees may be the basis for a claim. The Walmart administrative assistant and the plan service representative (both determined not to be fiduciaries) failed to provide Bowerman with complete and accurate information. The SPD lacked clarity and completeness as required by ERISA Section 102 when it failed to communicate that fully paid COBRA coverage would constitute continuous coverage and thereby avoid the 12-month preexisting condition limitation. While the Patient Protection and Affordable Care Act (ACA) has changed the law concerning preexisting condition waiting periods, courts continue to follow the breach of fiduciary duty analysis used in the Bowerman case when reviewing claims that fiduciaries provided inaccurate information.

Eddy v. Colonial Life Insurance

In this case, the employer terminated its group health plan. An employee, James Eddy, asked the plan's insurer, Colonial Life, about the status of his insurance coverage and was told by an agent essentially that he had no options. However, it turned out that there was an option to convert the group policy into an individual policy. In holding that Colonial Life breached its fiduciary duty to Eddy, the D.C. Circuit explained that the insurance company had to do more than not misinform. Rather, it had an affirmative obligation to inform Eddy about his insurance status and his conversion options.

3. When Silence Could Be Harmful

Some federal courts acknowledge that fiduciaries have an affirmative duty to inform participants and beneficiaries of material information (even if they don't make an inquiry) when there is a reasonable possibility that silence may be harmful.[5]

In *Griggs v. E.I. DuPont De Nemours & Co.,* Joseph Griggs elected to take an early retirement lump-sum benefit from his employer-sponsored plan. DuPont had assured him that he could roll over the lump sum into a DuPont-sponsored plan where it could grow on a tax-deferred basis and would not be taxed immediately. DuPont later realized that Griggs could not roll over his benefit into another tax-deferred plan sponsored by DuPont due to Code Section 415 limits but never told Griggs.

DuPont paid Griggs his early retirement benefit directly, which triggered a $50,000 tax. The Fourth Circuit determined that DuPont breached its fiduciary duty when it discovered that Griggs was not eligible for a tax-deferred lump-sum rollover and then remained silent even though it knew that he had acted on inaccurate assumptions.

The fiduciaries' failure to correct inaccurate information when they discovered the misunderstanding in *Griggs* serves as a reminder that circumstances particular to a single participant may require the fiduciary to disclose more information to prevent harm.

Specific situations where silence causes harm include when the plan document is ambiguous or when plan administrative procedures create ambiguity. Following are two examples.

Estate of Foster v. American Marine SVS Group Benefit Plan[6]

In this case, an employee developed cancer and was laid off in February 2016 but remained on the payroll until April 15, 2016 because of accrued paid time off. The life insurance SPD stated that his coverage would terminate on the last day of the month in which he no longer qualified for coverage. The participant passed away in June 2016, but the employer paid the premium only through April 30. Accordingly, the employee's surviving wife was not entitled to benefits under the policy.

In its reversal of a district court ruling, the Ninth Circuit explained that the SPD did not clearly indicate whether the participant's 31-day conversion period began February 29 (the month he was laid off), April 30 (the month he stopped receiving pay) or on a later date based on an exception for participants who were totally disabled. To compound the confusion, the employer continued to pay the group life insurance premium after February (the layoff date) and until April (while he was still on payroll).

The insurance carrier was not liable in this case because it merely administered claims and interpreted the policy. The notice responsibilities remained solely with the employer-plan sponsor, which had a duty to provide more complete information about the participant's conversion rights since the SPD was not entirely clear about when the life insurance policy would terminate. The Ninth Circuit reversed the district court's grant of summary judgment in favor of the employer, opining that the employer had a duty to notify the participant of his conversion rights beyond simply providing the SPD and had consequently breached its fiduciary duty.

Erwood v. Life Insurance Co. of North America[7]

Patricia Erwood, a widow, sought recovery from Life Insurance Company of North America and WellStar (her deceased husband's employer) because her husband was required to convert his group life insurance coverage into an individual policy within 31 days of group coverage terminating. The SPD mentioned conversion rights, but the district court said it was insufficient notice in this case because a provision in the life insurance company's administrative services manual stated that WellStar would provide participants with a notice of the right to convert benefits within 15 days following termination of employment.

The Erwoods were not properly informed about the life insurance conversion rights even though they had a meeting with WellStar and a representative from the life insurance company following the husband's diagnosis of terminal brain cancer. The court ultimately awarded Patricia Erwood $750,000 in damages, plus interest and attorney fees, for the loss in life insurance benefits because WellStar breached its fiduciary duty when it misrepresented and failed to adequately inform her of the need to convert the policy and how to do so.

Rulings Vary

Importantly, affirmative duty to inform cases are not all the same. Each case is evaluated on the unique situation presented. For example, in *Stahl v. Tony's Building Materials, Inc.,*[8] providing an SPD was sufficient disclosure (regarding notice requirements when a participant's pension benefits could be reduced after the collective bargaining agreement expired). The Ninth Circuit has acknowledged that sending an SPD can be sufficient in some cases but is not always enough. The critical inquiry is whether in a particular circumstance the employer has done enough "to provide complete and accurate information."[9]

4. Serious Consideration Doctrine

Finally, employers have an enhanced fiduciary duty when they give serious consideration to plan changes. Amending or terminating a plan is merely a settlor function, not a fiduciary function, but conveying information to participants about future plan benefits does entail a fiduciary act. While employers have a business interest in protecting future business plans (and plan design changes) from premature disclosure, employees also have a right to disclosure relating to their benefit plans. Many of the serious consideration cases have emerged from the adoption of retirement incentive plans and severance plans.

The Third Circuit developed a widely adopted test to ascertain whether a plan change (e.g., amendment or termination) is under serious consideration: It must be (1) a specific proposal (2) being discussed for the purposes of implementation (3) by senior management with authority to implement the change.[10] The proposal must be concrete enough to support consideration by senior management.

If a plan participant has not made an inquiry, serious consideration does not trigger a duty to voluntarily disclose prospective plan changes. In contrast, when a participant requests information regarding an ERISA plan, the fiduciary may owe a duty to provide information beyond the specific question asked. When a plan change is under serious consideration, fiduciaries must speak truthfully and avoid making affirmative material misrepresentations about the plan and its future.[11] Fiduciaries are not expected to accurately predict details and effects that the future changes will have on participants, but responses to participants must forthrightly answer inquiries and potentially reveal that a plan change is on the horizon.

Some courts recognize a duty to correct ongoing misstatements, such as a statement in an SPD that becomes misleading when a relevant plan change would render it inaccurate.[12] For example, in *Flanagan v. Allstate Insurance Co.,*[13] the plaintiffs alleged that the benefits personnel failed to disclose a new, advantageous severance plan under serious consideration when discussing terminating employment and severance benefits with employees. The court concluded that the plaintiffs adequately pled a claim for breach of fiduciary duty and denied the defendants' motion to dismiss.[14]

Consequences

In some instances, appropriate equitable relief under ERISA Section 502(a)(3) is granted to plaintiffs to remedy a miscommunication or disclosure failure and may include fines, penalties, restitution and estoppel depending on the claim.[15, 16] DOL also may sue parties to collect statutory civil penalties related to disclosure failures. As in all breach of fiduciary duty cases, fiduciaries can be found to be personally liable!

Conclusion

In summary, many disclosure-related fiduciary duties extend beyond requirements explicitly laid out in ERISA, the Code and regulations. Plan fiduciaries must stay abreast of circumstances that may lead to fiduciary liability, especially where the contours of these claims are constantly being refined by federal courts.

Following these steps can help plan fiduciaries ensure that disclosures meet ERISA requirements.

1. Provide legally and factually accurate communications at all times.
2. Make sure all communications are understandable to the average participant.
3. Consider whether additional information is appropriate given a participant's unique circumstances.
4. Quickly correct misstatements or incorrect communications.
5. Advise affected participants about benefit changes under serious consideration.

bios

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Endnotes

1. See e.g., *Darias v. Northwood Hospitality LLC,* No. 1:22-cv-01240 (D.Colo. 2022); *Bryant v. Walgreen Co.,* No. 8:22-cv-02732 (M.D.Fl. 2022); *Johnson v. McDonald's Corp.,* No. 1:21-cv-24339 (S.D.Fl. 2021) (settled); *Hicks v. Lockheed Martin Corp.,* No. 8:19-cv-00261 (M.D.Fl. 2019) (settled); *Pruitt v. Best Buy Co. Inc.,* No. 8:20-cv-00110 (M.D.Fl. 2020) (settled); *Riddle v. PepsiCo, Inc.,* No. 7:19-cv-03634 (S.D.N.Y. 2019) (settled); *Grant v. JPMorgan Chase & Co.,* No. 8:19-cv-01808 (M.D.Fl. 2019) (settled); *Vazquez v. Marriott Int'l, Inc.,* No. 8:17-cv-00116 (M.D.Fl. 2017) (settled).
2. See, e.g., *Hicks v. Lockheed Martin Corp.,* No. 8:19-cv-00261 (M.D.Fl. 2019); *Slipchenko v. Brunel Energy, Inc.,* No. H-11-1465 (S.D. Tex. 2015).
3. See *Varity Corp. v. Howe,* 516 U.S. 489 (1996).
4. 226 F.3d 574, 590 (7th Cir. 2000).
5. See e.g., *Griggs v. E.I. Dupont de Nemours & Co.,* 237 F.3d 371 (4th Cir. 2001); *In re Unisys Savings Plan Litigation,* 74 F.3d 420, 442 (3d Cir. 1996) (stating that the standard does not require disclosure of everything known to fiduciaries, only material information related to the investment risks at issue); *Erban v. Tufts Med. Ctr. Physicians Org., Inc.,* CV 22-11193-PBS, 2023 WL 363588 (D.Mass. Jan. 23, 2023) (holding that a fiduciary's knowledge that a beneficiary is severely ill or otherwise incapacitated triggers an affirmative duty to disclose relevant information).
6. 840 Fed. Appx. 170 (Mem) (9th Cir. 2021).
7. 2017 WL 1383922 (W.D. Penn. Apr. 13, 2017).
8. 875 F.2d 1404 (9th Cir. 1989).
9. *Foster,* 840 Fed. Appx at 173.
10. *Fischer v. Phila Elec. Co.,* 96 F.3d 1533, (3d Cir. 1996).
11. See e.g., *Martinez v. Zchlumberger, Ltd.,* 338 F.2d 407 (5th Cir. 2003).
12. *McAuley v. Int'l Business Machines Corp.,* 165 F.3d 1038 (6th Cir. 1999).
13. *Flanagan v. Allstate Ins. Co.,* 213 F. Supp. 2d 862 (N.D.Ill. 2001).
14. As the case progressed, the court ultimately denied the plaintiffs' class certification on the fiduciary duty claim because the class lacked commonality. In other words, the fiduciary duty claim could not proceed as a class action because the failure to respond to plan changes under serious consideration is specific to each employee and not applicable to the whole class. *Flanagan v. Allstate Ins. Co.,* 223 F.R.D. 493 (N.D. Ill. 2004).
15. *CIGNA Corp. v. Amara,* 563 U.S. 421 (2011). See also *Kenneth v. Dean Health Plan, Inc.*
16. *Amara,* 563 U.S. at 444; *Erwood v. Life Ins. Co. of N. Am.,* 2017 WL 1383922 (W.D.Penn. Apr. 13, 2017); *Stiso v. Int'l Steel Grp.,* 604 Fed. Appx. 494 (6th Cir. 2015).

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