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Identifying ERISA issues in litigation

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TRIALS & TRIBULATIONS

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Mention the Employee Retirement Income Security Act (ERISA) to many practitioners, and they immediately start looking for the exit.

Admittedly, navigating ERISA can be a daunting task, and the applicable case law can vary by circuit. But the reality is that you may have ERISA issues lurking somewhere in that pleading on your desk, and not even know it.

First and foremost, you must determine whether an ERISA-governed plan is involved. ERISA regulates more than just pension plans. Certain "employee welfare plans" also are subject to ERISA provisions, therefore ERISA can govern group life insurance plans, as well as medical, accident or disability plans. In addition, depending on how the plan is structured, ERISA also may apply to vacation benefits, certain employee training plans, employer-provided day care, unemployment benefits or severance benefits, and prepaid legal services plans, see 29 U.S.C. § 1002(1).

To further complicate matters, a "plan" does need not to be a formal, written document. 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," *Grimo v. Blue Cross/Blue Shield of Vt.*, 34 F.3d 148, 151 (Second Cir. 1994).

Of course there are myriad exceptions. Disability plans set up solely to comply with state laws, such as New York State's Workers Compensation Law, which requires employers to provide disability insurance, are not subject to ERISA. In addition, church or governmental plans are exempt from ERISA coverage, see generally 29 U.S.C. 1003(b).

Department of Labor regulations governing ERISA provide a helpful guide to the types of welfare plans subject to and exempted from ERISA, see 29 C.F.R. § 2510.3-1. As with many examples of federal regulation, they provide a bit of comedic relief: If your client is being sued because she failed to provide a much-anticipated holiday ham to employees, you will be heartened to know Section 2510.3-1(d) specifically states the distribution of holiday turkeys and hams will not constitute an ERISA-governed plan.

All kidding aside, why should you care whether your case may implicate ERISA? First, ERISA preempts any state law that relates to an ERISA-governed plan, with the exception of state laws governing "insurance, banking, or securities," 29 U.S.C. §§ 1144(a) & (b)(2)(A). So, a state law automatically revoking upon divorce a beneficiary designation in favor of the former spouse is preempted by ERISA, see *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

If your litigation involves a dispute over the potential beneficiary of either a life insurance or pension plan, always determine whether the plan is governed by ERISA. Regardless of the beneficiary designation form on file, where a pension plan is governed by ERISA, in general 50 percent of the retirement annuity must go to the surviving spouse. Welfare plans such as life insurance are not subject to this provision; however, as noted previously, a state law impacting the designation may be preempted.

ERISA also can impact the forum where your litigation is heard. Generally, both state and federal courts have concurrent jurisdiction to hear ERISA claims, however the litigation may be removable to federal court. Removal is available in instances of "complete" preemption, which exists when a state court claim can be recharacterized as an ERISA civil enforcement claim. In contrast, when ERISA merely provides a defense to the action (known as conflict preemption), the action is not removable absent complete diversity. The defense that a state law is preempted by ERISA, therefore, is not a sufficient basis for removal. A word of caution: If you represent a defendant, take heed of the time constraints in 28 U.S.C. § 1446. A defendant must seek removal within 30 days of service or receipt of the complaint.

If you represent a party to a potential interpleader

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action, the forum also may have monetary consequences for your client. CPLR allows the country treasurer to collect a fee of 2 percent of funds paid into court, see CPLR § 8010. Although fees also may be assessed in federal court, they may be set by a court order, and may not exceed the interest earned on the funds, see 56 FR 56356 (allowing fee of 3 percent of the principle, which must "be assessed from and may not exceed interest earnings"); see also W.D.N.Y. Local Rule 67.

ERISA creates fiduciary obligations for plan administrators, see 29 U.S.C. §1002(21)(A) (defining an ERISA fiduciary); 29 U.S.C .§ 1104(a) (describing the "prudent man" standard of care). As a result, an action regarding an employee stock ownership plan or similar arrangement likely may include an ERISA breach of fiduciary duty claim.

ERISA also affects whether a litigant can advance claims in court. For example, ERISA generally requires a plaintiff to exhaust administrative remedies before bringing suit. Likewise, the statute of limitations for a breach of fiduciary duty claim, brought pursuant to New York State law, is different than that for one brought under ERISA. In New York, the statute of limitations is governed by the type of relief sought. When legal relief is sought, an action accrues in three years. When the relief sought is equitable in nature, or when the claim sounds in fraud, the six-year statute of limitations applies, see *Klein v. Gutman*, 12 A.D.3d 417, 419 (2d Dept. 2004).

In contrast, ERISA provides that a breach of fiduciary claim must be brought within six years of the breach or, in the case of fraud or concealment, six years from discovery of the breach, or "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation," 29 U.S.C. § 1113.

ERISA also can impact the applicable standard of review. When a determination is based on the discretion of a plan administrator, denial of benefits will be reviewed under the arbitrary and capricious standard. All other claims, including claims for the breach of fiduciary duty, generally are reviewed *de novo*.

An ERISA litigant may be entitled to "reasonable attorney's fee and costs" in addition to prejudgment interest, see, e.g. *Jones v. UNUM Life Ins. Co. of America*, 223 F.3d 130, 138 (Second Cir. 2000). This is in contrast to the "American rule," which holds that each party must bear its own attorney's fees.

There is no question ERISA litigation can be complex, and it is impossible to cover all the aspects of ERISA litigation here. Whether representing a plaintiff or a defendant, if you think the action implicates any type of employee benefit, it is wise to investigate whether an ERISA-governed plan is involved.

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