LEGAL UPDATE

Back to Basics: Who is A Fiduciary under ERISA?

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Ever since Donald Trump's election to the presidency, most of the focus under Title I of ERISA, and appropriately so, has been upon the fate of the DOL Conflict of Interest regulations, which redefined what it means under Section 3(21) of ERISA to be a fiduciary by providing investment advice for a fee. In that light, it is appropriate to review some recent case law defining what activities cause an entity to be a fiduciary under ERISA Section 3(21).

Malone v. Teachers Insurance and Annuity Association of America (TIAA), a recent case from the Southern District of New York, involved a revenue sharing arrangement with a twist. TIAA provided both investment services, including the offering of a group annuity contract and recordkeeping services to a plan. Payment for the recordkeeping services associated with group annuity contracts was provided by a recordkeeping offset, whereby TIAA allocated a portion of the investment fee to pay for its recordkeeping service. However, TIAA would not permit this revenue sharing to be paid to a party other than itself. As a result, if the plans changed recordkeepers, they would continue to pay the investment fee to TIAA, none of which would be used to offset the recordkeeping fee charged by the new recordkeeper, so that the plans would be required to pay the new recordkeeper in full. TIANs practice of refusing to share revenue with a potential third party was not a subject of negotiation with the plans and was not disclosed to the plans at the time the services. Further, the recordkeeper agreement between the plan and TIAA was silent on this issue.

On these facts, plaintiffs alleged that TIAA became a fiduciary: (1) when it exercised discretionary control over the fee to be used as a recordkeeping offset; (2) by exercising discretion to take plan assets subject to its undisclosed policy that it would not share the recordkeeping offset; and (3) by adopting an undisclosed policy that would enable it further to exercise its discretion to take plan assets. The District Court rejected all of these arguments. It stated that calling an undisclosed policy of refusing to share the recordkeeping offset an exercise of discretion did not make it so, nor did allegations that the undisclosed policy caused the plans to be locked into the recordkeeping services for the full term of the annuity or mutual fund. The mere fact that the fees used to pay for the recordkeeping services were paid from plan assets did not mean that the collector of the fees had authority over the plan assets to make it a plan fiduciary.

To constitute an exercise of discretion there must be either an act or an omission. The original agreement between TIAA and the plan regarding TIAA's compensation, embodied in the recordkeeping agreement, was not a discretionary act. The District Court explained that when a person who has no relationship to an ERISA plan is negotiating a contract with that plan, he or she has no responsibility to the plan and is unable to exercise any control over a trustee's decision whether or not, and on what terms, to enter into an agreement with him. Therefore, such a person is not a fiduciary with respect to the terms of his or her contract.

Further, a service provider's periodic collection of fees is not a discretionary act giving rise to a fiduciary duty. The fact that a service provider could refrain from collecting the fee that he or she is due does not change this result. In other words, courts will not read the term "discretionary authority" to include any concession that a service provider could gratuitously make to a plan. As the Court of Appeals for the Seventh Circuit expressed this point, "If a specific term (not a grant of power to change terms) is bargained for at arm's length, adherence to that term is not a breach of fiduciary duty. No discretion is exercised when an [administrator] merely adheres to a specific contract term." Plaintiffs may have entered into a bad deal with TIAA, but they could not convert that bad deal into any breach of fiduciary duty by TIAA, because it had no way of establishing the threshold requirement that TIAA was a fiduciary.

A similar analysis was applied in another case recently decided in the Southern District of New York, *Patrico v. Voya Financial, Inc.* Plaintiff's claims for breach of fiduciary duty by charging excessive fees were dismissed because plaintiff could not establish that the applicable Voya entity was a fiduciary. Under applicable case law in the Second Circuit, when a service provider with no relationship to a ERISA plan is negotiating a contract, it is not an ERISA fiduciary with respect to the terms of the agreement for its compensation.

In short, outside of the issues with respect to becoming a fiduciary by virtue of providing investment advice for a fee, long-standing principles for determining whether a party is a fiduciary are unaffected. Buyer and advisor beware!

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