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Plan Sponsor Basics

Handling Benefit Claims for Retirement Plans

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What We Will Cover

- Types of claims that are subject to ERISA's claims and appeals procedures
- Basic overview of ERISA's claims and appeals procedures
- Plan document and summary plan description (SPD) considerations
- Benefits of following (and consequences of not following) ERISA's claims and appeals procedures
- Attorney-client privilege issues

Claims Subject to Claims and Appeals Procedures

- Claims for retirement benefits, BUT NOT:
  - Claims of misconduct constituting breach of fiduciary duty
    - *breach of duty of loyalty*
    - *failure to disclose*
    - *misrepresentations*
  - Claims or inquiries about eligibility or participation (but be careful of overlap with underlying claims of entitlement to benefits)
  - Routine inquiries about benefits or how plan provisions work on a particular point (e.g., calculating service, determining compensation)

Claims Subject to Claims and Appeals Procedures (cont'd)

- As a matter of scope, this presentation does not address unique and additional concepts that apply to health and welfare plan claims for benefits
- However, general concepts covered also apply to health and welfare plan claims for benefits
- These same retirement plan rules and concepts apply to ERISA-covered severance plans

Overview of Claims and Appeals Procedures

- ERISA Section 503 requires plan fiduciaries to
  - Establish a reasonable procedure for administering claims
  - Provide written notice of claims and appeals determinations
- Minimum thresholds for reasonable claims procedures:
  - Claims determination by a designated claims fiduciary
  - Procedures must not unduly inhibit or hamper a claimant's ability to bring a claim (e.g., could not impose a "fee" for bringing a claim)

Overview of Claims and Appeals Procedures (cont'd)

- Procedures must permit a claimant to be represented by an authorized representative
- Procedures must contain administrative safeguards to ensure that claims determinations are made in accordance with the plan document and applied consistently with respect to similarly situated participants
- Exception for collectively bargained plans that contain procedures for disposition of claims and grievance and arbitration procedures for appealing adverse determinations

Overview of Claims and Appeals Procedures (cont'd)

- Regulations contemplate two-level claims and appeals procedures and each level must satisfy:
  - *Certain timing requirements regarding disposition of claims/appeals*
  - *Certain notice/content requirements regarding the claim/appeal determination*
- Timing requirements for first claims level
  - *Claims fiduciary must make initial determination within 90 days*
  - *Claims fiduciary may take up to an additional 90 days (total of 180 days) if (1) there are special circumstances requiring more time, and (2) claims fiduciary notifies claimant of need for additional time within initial 90-day period and explains the circumstances requiring additional time*

Overview of Claims and Appeals Procedures (cont'd)

- Notice/content requirements for first-level claims – notice of a claims denial must include:
  - *Specific reasons for the denial*
  - *References to specific plan provisions upon which the denial was based*
  - *A description of additional material or information necessary to perfect the claim and an explanation of why such information is necessary*
  - *A description of the plan's appeal procedures (including time allotted for bringing an appeal)*
  - *Notice of a claimant's right to bring a claim in federal district court if claim is later denied on appeal*

Overview of Claims and Appeals Procedures (cont'd)

- With respect to appeals of first-level claims denials, a plan's claims and appeals procedures must:
  - *Provide claimants at least 60 days to make an appeal*
  - *Provide claimants with the opportunity to submit written comments, documents, and other relevant information (no requirement to offer an in-person hearing)*
  - *Provide that claimants may request and must be provided reasonable access (free of charge) to all information that is "relevant" to the claimants' claims*
  - *Provide for a review that takes into account all information submitted (even if not considered during first level)*

Overview of Claims and Appeals Procedures (cont'd)

- Timing requirements for second-level claims appeals
  - *Claims fiduciary must make determination within 60 days*
  - *Claims fiduciary may take up to an additional 60 days (total of 120 days) if (1) there are special circumstances requiring more time, and (2) claims fiduciary notifies claimant of need for additional time within initial 60-day period and explains the circumstances requiring additional time*
- Notice/content requirements for second-level claims appeals – notice of an appeal denial must include:
  - *Specific reasons for the denial of the appeal*
  - *References to specific plan provisions upon which the denial was based*

Overview of Claims and Appeals Procedures (cont'd)

- *A statement that a claimant is entitled to receive (upon request and free of charge) reasonable access to, and copies of, all documents, records, and other information "relevant" to the claimant's claim for benefits*
- *A description of any voluntary appeals procedure*
- *A statement of the claimant's right to bring an action in federal district court*

– Unlike health and disability claims, there is no requirement that the first and second levels of retirement plan claims be evaluated/decided by a different person or entity

Plan Document and SPD Considerations

- SPD must contain description of claims and appeals procedures
- Post-*CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), it is best to place this in the main plan document too, and/or, at minimum, to state that the SPD is part of the plan
  - Claimants can now argue that deadlines for claims and appeals are not enforceable if they are found only in the SPD
  - Outcome is likely to turn on whether the SPD states it is part of the plan

Plan Document and SPD Considerations (cont'd)

- Plan documents should include *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), grant of discretion to ensure deferential standard of review in litigation
  - Again, the most conservative approach is to put this language in the main plan document and not just the SPD
  - Post-*Amara*, some courts have held that *Firestone* language in the SPD will not be considered when determining the standard of review, particularly where the SPD does not state that it is a plan document
- While not required, plan sponsors may want to consider including plan provisions that establish specific statutes of limitations for bringing claims

Benefits and Consequences

- Why compliance with the claims and appeals regulations matters in litigation:
  - Impacts availability of affirmative defense for failure to exhaust administrative remedies
    - *Regulations indicate that the failure to comply means participants have green light to sue without exhausting administrative remedies*
    - *Participants also likely to argue exhaustion would be futile*
  - May also impact ability to claim deferential standard of review, which is often outcome-determinative

Benefits and Consequences (cont'd)

- Standard of review:
  - If administrator is given discretion, then normally a determination will not be overturned unless it is "arbitrary and capricious." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989)
  - Conflict of interest is also a factor to be considered. *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008)
    - *Conflict is given more consideration with history of biased claims administration and absence of efforts to ensure accurate claims decision*
    - *Conflict is given less consideration if steps are taken to ameliorate conflict*

Benefits and Consequences (cont'd)

- Standard of review can have implications for discovery process:
  - Limited scope of review under the abuse of discretion standard, limits ERISA discovery
  - Exceptions include discovery on questions of impartiality and the documents governing administration of the plan
  - Post-*Glenn*, the trend is to permit discovery as to potential conflicts, but some courts require that plaintiffs first show the denial of benefits was improperly influenced by the administrator's conflict of interest

Attorney-Client Privilege Issues

- Fiduciary exception to the privilege:
  - Otherwise-privileged legal advice given to ERISA fiduciaries to aid them in the performance of their duties is discoverable by plan participants
  - The logic is two-fold:
    - *ERISA fiduciaries have a duty to make information regarding the administration of a plan available to the plan's participants, similar to the obligation of trustees to be forthright*
    - *Fiduciaries are not served personally by counsel; rather, as a representative of the beneficiaries, legal counsel inures to the benefit of the beneficiaries, who are the real clients*

Attorney-Client Privilege Issues (cont'd)

- Exceptions to the exception:
  - The fiduciary exception does not apply to:
    - *Plan sponsor (i.e., "settlor") activities*
      - Fiduciary – plan administration, claims and appeals, and investment of plan assets
      - Plan sponsor/settlor – creation, design, modification, or termination of plan
    - *Nonparticipant third parties*
    - *Legal advice given to a fiduciary for his or her personal defense from civil or criminal liability*
    - *Advice where the fiduciary's and participants' interests have "diverged"*

Attorney-Client Privilege Issues (cont'd)

- When do the interests diverge?
  - "Pre-decisional"
    - *In communications before the claims procedure is exhausted, courts often find that the fiduciary exception trumps the attorney-client privilege*
    - *The reasoning is that all beneficiaries, including those who are ultimately disappointed, are entitled to know what the legal opinion was in its oral and written forms*
  - "Post-decisional"
    - *Protected by the attorney-client privilege because they occurred after the divergence of interest*

Questions?

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