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Enforcement of "Age Out" Provision Under Life and AD&D Plan Leads to Breach of Fiduciary Duties

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A recent ruling from the U. S. District Court for the Eastern District of Arkansas provides that a participant in a life and accidental death and dismemberment (AD&D) plan is entitled to death benefits for the death of her 24 year old son even though he had aged out under the terms of the plan when he turned 23. This case is of note because there was no dispute that the plan clearly provided that dependents were not eligible for coverage after they turned 23 and the participant did not notify her employer or the insurer when her son turned 23. However, the court ruled that the participant's employer and the insurer, both as fiduciaries for the plan, had breached their fiduciary duties under ERISA because they continued to accept premiums without informing the participant that her son was no longer eligible to be covered under the plan.

Background

The life and AD&D plan in this case provided for an automatic rollover of the prior year's coverage. During the 2014 open enrollment, the employer sent the participant a benefits enrollment sheet listing her son as her sole dependent. The participant took no action and the coverage rolled over for 2014. Her son turned 23 in March 2014. Neither the plan fiduciaries nor the participant notified the other that the participant's son had aged out of coverage. In late 2014, the employer sent the participant another benefits enrollment worksheet that listed her son as her dependent. The participant took no action and her son was again rolled over as her sole dependent for 2015. The participant's son died in a car crash in October 2015.

Following the death of her son, the participant filed a $10,000 claim for death benefits under her employer's life and AD&D plan. The insurer denied the claim

Our Practice

We advise public, private, taxable and tax-exempt clients on a wide variety of issues related to the design, preparation, communication, administration, operation, merger, split-up, amendment and termination of all forms of employee benefit plans and executive compensation programs and related funding vehicles. The firm has defended clients in significant high-profile ERISA litigation matters, including 401(k) plan "stock drop" cases and other breach-of-fiduciary-duty class actions.

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on the basis of the age out provision, and the employer refunded the premiums for the period that the dependent was not eligible for coverage. The participant claimed that she was not told about the age out provision in the plan and that her employer and the insurer were aware of her son's birthdate because of information provided in connection with enrollment in the employer's medical plan. The participant filed suit requesting relief for alleged violations of ERISA.

Ruling

Despite the assertions of the insurer and the participant's employer that the participant should have known her son was not covered at the time of the accident, the Court held that the "flawed administrative procedures" of the employer and insurer violated the fiduciary duties owed to the participant, and that these procedures permitted participants to pay for coverage for dependents who were ineligible. Further, by failing to verify eligibility, the insurer did not fulfill its duty to "determine eligibility for benefits", and the insurer's inactions allowed it to potentially profit from employees who paid premiums for benefits that they were otherwise ineligible for. The court awarded the participant the amount of the benefit claim, as well as costs and attorneys' fees.

Takeaway for Employers

Although participants are subject to plan rules, this case suggests that employers and insurers may need to adopt additional processes to verify age based eligibility provisions, especially in connection with any automatic rollovers of prior year's coverage elections. Possible processes to consider include:

- Having employees certify their dependents' eligibility during each annual enrollment;
- Coordinating possible information sharing between plans (subject to applicable plan and legal requirements, including HIPAA); and
- Where the employee has the obligation to notify the plan regarding dependent eligibility changes, the SPD should state that it is the employee's sole responsibility, and coverage will not be in effect even if premiums are paid.

The case is Frye v. Metro. Life Ins. Co., 2018 BL 114071, E.D. Ark., No. 3:17-cv-00031-DPM, 3/30/18.

King & Spalding is happy to assist employers with reviewing their administrative procedures, as well as assist with any questions relating to their fiduciary duties with administering benefits plans.

Department of Labor's Latest Fiduciary Guidance on "Social Investing"

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The Department of Labor (DOL) issued Field Assistance Bulletin No. 2018-01 (FAB 2018-01) to provide guidance relating to economically targeted investments (ETI) and shareholder rights. The DOL also gave its view on the extent to which environmental, social and governance (ESG) factors may be considered by plan fiduciaries when making investment decisions.

Background

As we previously noted in 2015, fiduciaries have long sought to understand the extent to which an investment's collateral social benefits can be considered in addition to its risk and return. Beginning as early as 1994, the DOL has occasionally issued guidance either limiting or expanding the fiduciary's discretion in this area depending on the views of the current Administration.

In the latest guidance, the DOL states that investment decisions should be first and foremost based on the financial factors that will have an impact on the risk and return of the investment. Only then may ESG factors be considered and even then they should only be selected for the economic benefits they provide.

Overview of Field Assistance Bulletin No. 2018-01

FAB 2018-01 was issued to provide guidance to the Employee Benefits Security Administration's national and regional offices on how to address questions from plan fiduciaries regarding the two most recent DOL Interpretive Bulletins (IB 2016-01 addressing shareholder rights and investment policy statements and IB 2015-01 relating to ETIs). The FAB reiterates the principle that fiduciaries may not take risks to promote social policy goals when making investment decisions. According to the DOL, "[F]iduciaries must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision." Indeed, an investment that supports ESG factors or encourages industry growth does not make it a prudent choice without first considering how the investment bolsters the economic interests of the plan.

Likewise, the FAB clarified that if investment policy statements include policies relating to the use of ESG factors to analyze investments, fiduciaries are not always required to adhere to such policies. Rather, the investment policy statement is part of the "documents and instruments governing the plan" and only requires compliance to the extent the policies are consistent with ERISA.

The FAB also addresses the consideration of ESG factors in a qualified default investment alternative (QDIA). The DOL stated that while it may be possible to appropriately select ESG-themed investments for QDIAs, doing so would raise questions about the fiduciary's compliance with the duty of loyalty requirement since it is virtually impossible to select investments with ESG factors that take into account the views of each of the plan participants and beneficiaries.

Finally, FAB 2018-01 clarifies the extent to which plan assets can be used to support shareholder activities. While the DOL maintains the view that proper plan management involves fiduciaries engaging in proxy voting and other shareholder engagement, the guidance suggests that such activities should only be undertaken with minimal use of plan funds. It is expected that the institutional investment managers who are appointed as fiduciaries generally handle these tasks without any cost to the fund. FAB 2018-01 refers to the following examples of activities that should not be paid for by plan funds: "fund advocacy, press, or mailing campaigns on shareholder resolutions, call special shareholder meetings, or initiate or actively sponsor proxy fights on environmental or social issues relating to such companies." According to the DOL, this position is in line with the requirement that fiduciaries cannot use plan assets to further social collateral goals.

Employers with qualified plans subject to ERISA should be aware of the guidance issued in FAB 2018-01. King & Spalding is available to assist you with questions and fiduciary issues that arise in connection with your plan investments and implementation of your plan's investment policy statement.

June and July 2018 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for the next two months. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is usually delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

Deadline	Item	Action	Affected Plans
June 30 (last day of 6th month following the plan year)	Excess Contributions	Deadline for plan administrator to distribute EACA excess contributions and earnings from the prior year to avoid 10% excise tax.	401(k) Plans with EACA
July 29 (no later than 210 days after the end of the plan year in which the change was effective)[1]	Summary of Material Modifications	Deadline for plan administrator to distribute summary of material modifications reflecting any changes to the summary plan description (SPD) arising from any plan amendments adopted during prior year (unless a revised SPD is distributed that contains the modification).	Retirement Plans Health & Welfare Plans

1Note: Disclosure of a modification to a group health plan that is a "material reduction in covered services or benefits under the plan" must be made no later than 60 days after the date of the adoption of the modification. Also, a material modification to a group health plan that is not reflected in the most recently provided "summary of benefits coverage" or "SBC" must be provided in a summary of material modifications at least 60 days before the modification becomes effective.

Deadline	Item	Action	Affected Plans
July 31 (the last day of the 7th month following the plan year)	DOL Form 5500	Deadline for plan administrator to file Form 5500 (Annual Return/Report of Employee Benefit Plan) for prior year. This deadline is extended 2 ½ months if the plan administrator files Form 5558.	Retirement Plans Health and Welfare Plans
	IRS Form 8955-SSA	Deadline for plan administrator to file Form 8955-SSA (Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits). This deadline is extended by 2 ½ months if the plan administrator files a Form 5558.	Retirement Plans
July 31	Patient Centered Outcomes Research Institute (PCORI) Fee	Deadline for self-insured health plans to pay a fee for 2017 plan year using IRS Form 720. Note that the fee is not tax deductible. Insurers are responsible for paying the fee on behalf of insured plans.	Self-Insured Group Health Plans (including retiree plans)