ERISA's Perfect Storm: Participant Requests for Benefits Paid Decades Ago

November 12, 2014

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The Problem: Beware the Foibles of Memory

- History:

1. Law - birth and evolution of ERISA

2. Technology – birth and evolution of computers

3. Plans – multiple employers/multiple plans/multiple recordkeepers, etc.
The Problem: Beware the Foibles of Memory

- Today:
  1. Boomers are retiring – memories fade
  2. Social Security Notice – deferred vested benefits
  3. Plaintiffs’ bar has discovered ERISA
How Long Should Records Be Kept?

- I only have to keep tax records for seven years, why would I keep ERISA plan records for longer?

- Isn’t there some point in time at which I can just get rid of all the old stuff?

- ERISA § 209 requires employers to “maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees.” 29 U.S.C. § 1059(a)(1).
Social Security Administration

Potential Private Retirement Benefit Information

We are writing to tell you that you, or the worker whose Social Security number appears at the top of this form, MAY be entitled to some retirement benefits from a private employer. Also, your family, or the worker's family, may be entitled to retirement or survivor benefits.

These Are Not Social Security Benefits

These potential benefits are NOT Social Security benefits. We do not make any decisions about the payment of these benefits. Please see below for basic information about these retirement benefits.

Information About Retirement Benefits

You have, or the worker has, earned retirement benefits although no longer employed in a job covered by the retirement plan. These are called "deferred vested benefits." Private retirement plan administrators must provide information about such benefits to us through the Internal Revenue Service. We provide this reported information about the retirement plan when the individual asks for it or when a claim is filed for Social Security benefits. Social Security does not have any information about the benefits other than what appears below.

If You Want to Apply for These Benefits

If you want to apply for these retirement benefits or have any questions, you should contact the Plan Administrator shown below. The Plan Administrator provided the information as of the date in the Year Reported field below. If you or the worker has already tried a claim and received payment from the plan below, you may not be eligible for any additional benefits. Include a copy of this notice when you contact the Plan Administrator.

Plan Name

REDACTED

Plan Number

REDACTED

Identification Number

KilledWid Post MMD Amount

REDACTED

Plan Administrator and Address

REDACTED
The Scope of The Problem

- Claims:

  1. Benefits
  2. Breach of Fiduciary Duty
  3. Penalties
Common Examples

- The “forgotten” DB plan:
  1. In-house administration/recordkeeping
  2. Service providers with limited roles, and changing systems
  3. Reactive, not proactive, benefits counsel
Common Examples

- The “vampire” ESOP
  1. Acquired in a transaction
  2. Attempted termination
  3. Records in the attic
Common Examples

- Some common scenarios:
  - I never received my lump sum check
  - I worked more hours than you credit me for
    - What level of detail is required?
  - I met eligibility requirements for certain benefits
Common Examples

- Common scenarios:
  - I never signed a spousal consent
    - Consent for forged
  - Lost beneficiary designation form
    - Wife #1 and wife #2 both claim they were designated – interpleader?
The Solution: What Can We Do Now?

- Don’t wait for claims/lawsuits to be filed:
  1. Records
  2. Service providers
  3. Compliance
  4. Plan Terms
The Solution: What Can We Do When the Claim is Submitted?

Administrative Appeals Are Good For You (a/k/a ERISA is your friend):

1. Investigation
2. Regulations
3. Defenses
4. Resolution
The Solution: What Can We Do When the Lawsuit is Filed?

- Make Sure You Use What ERISA Provides:
  1. Exhaustion
  2. Standard of Review
  3. Limit Discovery
  4. Defenses