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From the Editor

Participant Communication Conundrum: Simple and Effective or Complete and Unreadable?

Whether highly literate or a high school dropout, most folks will not read about their "complicated and boring" benefits. And, even those who do generally won't read anything longer than a page. The few participants getting past page one are those with an immediate need to know, such as a near-retiree who finally (and perhaps too late) peruses the pension or 401(k) summary plan description (SPD).

As difficult as it is to get participants to read anything, ERISA naively insists that employers provide participants with a detailed and complete plan summary including many pages of Department of Labor (DOL) boilerplate. Add some hostile court decisions punishing employers for less than perfect disclosure to the mix, and SPDs are both unread and unreadable. It's time for a rewrite of the disclosure rules.

The problem of unreadable disclosure was succinctly summarized by a 2005 report of the DOL Advisory Council: "[c]ourt decisions have changed the nature of the SPD from an understandable summary … to a legal description of the plan's benefits …. Until SPDs are legally returned to their intended status as plan summaries that do not modify or supersede the actual terms of the plan document … SPDs [will be] written to protect the sponsor from liability, not to help the participant understand the terms of the plan."

Three recent cases involving (1) intentional employer misdirection, (2) an honest omission, and (3) clear language turned upside down underscore the problem. (In all three I am taking the court's findings

at face value without independent knowledge of the facts or any parties' purported behavior.)

In *Osberg v. Foot Locker Inc.* (2d Cir., No. 15-3602, 7/6/17), the employer, according to the district court and the US Court of Appeals for the Second Circuit, wrote an "intentionally false and misleading" SPD to soft-pedal a cut in future benefits. Footlocker converted its traditional pension plan to a cash balance formula with a "wear away" in which participants would get the greater of their frozen pre-conversion pension or their cash value benefit. The trial court found that not only did Footlocker misleadingly hype the change as a positive but also failed to disclose that certain participants would not earn any additional pension benefits for several years until their cash balance account caught up with the frozen traditional pension. The wear-away formula was legal, but the Second Circuit ruled that, in deliberately keeping the bad news from employees, Footlocker violated ERISA's disclosure and fiduciary rules. The Second Circuit's remedy for this breach was to rewrite the pension plan to give participants the benefits they "reasonably expected" based on the employee communications—essentially eliminating the wear away and reinstating the traditional pension formula. The Second Circuit took its amendment authority from the US Supreme Court's landmark *Cigna Corp. v. Amara* decision giving courts the power to award Section 502(a)(3) "appropriate equitable relief" to right ERISA wrongs. Importantly, the Second Circuit gave all affected participants the benefit of the judicial rewrite without needing to prove reliance on the misleading disclosure and regardless of whether some participants received a significant windfall. That was the price of intentionally misleading participants.

What if the employer, in good faith, left something out of an SPD—either by innocent mistake or to make the summary readable rather than all-inclusive? A recent DOL *amicus* brief filed with the US Court of Appeals for the Sixth Circuit in *Pearce v. Chrysler*, a case currently before the court, shows one approach. Randy Pearce thought he was entitled to an early retirement subsidy under his employer's pension plan. Although the SPD listed the general conditions for early retirement, it omitted a scenario that affected Pearce, who claimed to have turned down several job buy-outs in part because he believed he had a vested right to an early-retirement subsidy. Unfortunately for Pearce, under the plan document he was ineligible for the subsidy because he did not retire (he was fired). The DOL argues in its brief that the SPD's omission of the plan rule depriving Pearce of his benefit was a "material omission" as to Pearce and hence a violation of the employer's ERISA fiduciary duty to include all information necessary for an average person to determine what the benefits are. Under *Amara,* the DOL argues, the court should equitably rewrite the plan

to give Pearce his early retirement benefit. And, according to the DOL, it does not matter whether he relied on the SPD. Taken at face value, the DOL is saying that if the SPD is more favorable to a particular participant than the plan, the SPD governs; if the plan is more favorable, the plan governs: a win-win for participants.

A recent US Court of Appeals for the Fifth Circuit decision shows how a clever participant can stand simple writing on its head to get a benefit windfall. *Thomason v. Metropolitan Life Insurance Company* (No. 16-10634 (5th Cir. 2017)) involved Verizon's employer-provided long-term disability (LTD) policy which, as is typical, offset LTD payments by any pension that the participant "elected to receive." Plaintiff Joel Thompson was a Verizon employee who became disabled, began collecting LTD benefits, and then elected to directly rollover his pension benefit in a lump sum to his IRA. The LTD plan administrator, MetLife, reduced Thompson's monthly disability check from $2,571 to $1,251 based on what Thompson's monthly pension would have been had he taken a single life annuity. Thompson protested the offset, claiming he did not elect to receive his pension because it was directly rolled over to his IRA. His claim was denied. Thompson sued and, incredibly, won in both the district court and Fifth Circuit. Both courts found the "elect to receive" wording in the SPD (which also served as the plan document) was ambiguous, thus empowering a court to reinterpret the SPD by resolving ambiguities against MetLife as the drafter. The Fifth Court then found that Thompson neither "controlled" nor "received" his pension because it was directly transferred from the plan to his IRA. Thus, the offset was inappropriate. Really? Although he did not physically put the money in his pocket, Thompson voluntarily directed the transfer to his own IRA. Incredibly, the Fifth Circuit ignored that the LTD plan SPD gave MetLife full discretionary authority to interpret the plan because the discretion does not apply to SPDs. So Thompson gets an extra $1,000 a month, and disability plan SPDs will become more complicated as company attorneys add lengthy descriptions of every conceivable way a participant could "receive" the pension benefit.

If the SPD can trump the document, SPDs will be written like plan documents. Of course, the plan document is essentially worthless for employee communications; understandable summaries that actually will be read must use simple language and omit some details. But if plan sponsors will be punished for omissions and other good faith "imperfections," why should they take the litigation risk or spend money to turn legal jargon into English.

What to do?

Absent fraud or intentional misdirection, courts and regulators should apply an abuse-of-discretion approach in judging an employer's disclosure. There are many reasonable ways to write an SPD, and

plan sponsors should be allowed to choose what they think best. A thoughtful SPD that overlooks a plan rule in favor of readability should be allowed. Courts should exercise extreme care before rewriting a plan to add unintended benefits. Requiring that participants relied on the errant communication and experience actual harm would help. But a general recognition that perfect disclosure is impossible and innocent mistakes happen is crucial.

With a more flexible and forgiving attitude by courts and the DOL, employers and vendors then should consider a Russian doll approach: Start with a zippy one pager with the bare essentials, which links to something longer that outlines the basics, which in turns connects to a full-fledged SPD, and finally the actual plan document. As long as the dots are connected and there is no intent to deceive, this should be enough to protect employers from paying for benefits they didn't promise. To promote readability, the DOL could develop readable model language. For the model to work, the DOL would have to employ writers (not lawyers) and not make perfect disclosure the enemy of the good. Simple and readable model wording would be particularly helpful to small businesses without the resources to create their own communications. Developing good models also would be a much better use of government resources than jumping on employers that tried, but failed, to disclose everything.

The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.

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