FOCUS ON BENEFITS

ERISA Section 510: The Setting Is Ripe For Claims

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ERISA section 510 makes it unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled or may become entitled under an ERISA plan. It also makes it unlawful to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has or is about to testify in any ERISA-related inquiry or proceeding.

With layoffs continuing into the second half of the year, the setting is ripe for an increase in claims by employees who believe their discharge was motivated by their employers' desire to reduce or avoid benefit plan expenses. And section 510 claims are not necessarily made in a vacuum. They can come as part of a general wrongful discharge claim, age discrimination claim, or a whistleblower action where the employee also alleges the employer attempted to interfere with ERISA-protected rights.

Consider, for example, an employee with a family member who has high healthcare expenses due to a chronic illness. These expenses are covered by the employer's self-insured or partially self-insured health plan. The employee is over age 55. With perhaps less than perfect attention to management protocols, he is discharged for poor performance. The employee may allege his discharge was driven by the employer's desire to reduce its health plan costs.

Consider also an employee, or a group of employees, terminated just prior to vesting in the company's pension plan. There may be allegations that the termination was due to the employer's desire to reduce pension costs. Again, an ERISA section 510 claim is a likely addition to other claims.

ERISA provides plan amendment and termination procedures that can generally be used to eliminate or reduce plan costs. However, actions that circumvent these procedures, such as discriminating on the basis of the use or potential use of plan benefits, may constitute an ERISA section 510 violation.

ERISA SECTION 502: THE MUSCLE BEHIND SECTION 510

ERISA section 502 is the enforcement provision for ERISA section 510 violations, under which participants and beneficiaries may bring claims to recover benefits due under the terms of the plan, enjoin any act that violates ERISA, or obtain other appropriate equitable relief. Such relief may include reinstatement to the individual's former position. ERISA does not provide punitive or compensatory damages. Because section 502 provides only equitable relief, monetary damages

are not available under this provision. However, in certain circuits, back pay may be an available form of restitution, and there is a good chance that a successful plaintiff will be awarded attorney's fees and costs.

THE BURDEN OF PROOF

The burden of proof and order of production of evidence in ERISA section 510 actions are generally governed by either the Price Waterhouse "mixed motives" analysis or the McDonnell Douglas "pretext" analysis that are used in employment discrimination claims.

A Price Waterhouse analysis is used when the plaintiff presents direct evidence such as conduct or statements by decision-makers reflecting a discriminatory attitude that more likely than not influenced the decision to terminate the employee. The defendant employer then has the burden to prove, by the preponderance of the evidence, that it would have made the same decision absent the alleged discrimination.

To illustrate a Price Waterhouse analysis, consider a long-term employee whose spouse develops a chronic illness. The spouse is employed and covered by her employer's health plan. Prior to the employee's termination, his supervisor (who works closely with the benefits personnel) asks him about the treatments that his spouse is undergoing, how long he expects the illness to persist, and whether his spouse will continue working for her employer. After he is terminated, the employee brings an ERISA section 510 claim, alleging that his employer was concerned the spouse would become eligible under the company's self-insured health plan. The employer must then prove, by a preponderance of the evidence, that it would have terminated the employee absent the alleged discrimination.

Of course, many employers are too savvy to make comments reflecting an attitude to discriminate on the basis of ERISA-protected benefits. As a result, plaintiffs must often present circumstantial evidence to establish discrimination. This brings into play a McDonnell Douglas analysis.

To illustrate a McDonnell Douglas analysis, consider a high-paid employee who worked for his employer for two and a half years. His employer's pension plan uses a three-year cliff vesting schedule (i.e., participants with less than three years of employment are 0% vested and those with three years or more are fully vested in the plan). The benefits are based on years of employment and compensation. Greater benefits accrue to those with higher salaries. Despite having better performance appraisals than a co-worker, who performs a similar job, the employee is the one discharged when the company decides to eliminate a position in his work unit. Unlike the employee, the co-worker has been employed for just over three years and is fully vested in the plan.

The employee alleges an ERISA section 510 violation. He claims that his discharge was motivated, in part, by the employer's desire to prevent his vesting and thereby avoid the cost associated with his pension benefits. After the employer

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articulates a legitimate reason for the discharge, the employee must prove by the preponderance of evidence that the employer's true motivation was to prevent vesting.

EVIDENTIARY CONSIDERATIONS

In nearly all cases, the key issue will be the causal connection between the protected activity and the adverse employment action. To establish the causal connection, it may be useful to consider the following evidence.

Evidence relevant to both health plans and pension plans is a matter of who said what:

- The identity of the individuals who made the decision to terminate the employee and whether they are those typically involved in such decisions. If those who made the decision are not typically involved in such decisions, and they have access to benefit plan information, this may suggest the decision was related to plan benefits.
- The data the company monitors when evaluating the cost and feasibility of its benefit plans. Monitoring individual-level data may indicate the company may be motivated to treat employees differently based on their benefit expense.
- Correspondence related to the decision to terminate the employee and such other evidence relevant to most discrimination claims.

Some of the evidence relevant to an employer provided health plan includes:

- The identity of personnel who administer the plan and who have access to participant benefit information.
- The decision-makers':
  - Knowledge of or perception of the employee's health care expenses or the expenses of covered family members.
  - Access to and concern with health expense information.
- How closely the company monitors each participant's health expenses, whether the company forecasts individual future health expenses or analyzes data in the aggregate, and to whom this information is reported.
- The trajectory of the company's health care expenses. If the company's health costs were relatively stable, or increasing in a moderate and stable trajectory over time, this may indicate that health costs did not influence the decision to terminate the employee.
- If the termination was part of a larger reduction in force, other employees' health expenses may suggest whether or not these expenses were a factor. If there is no correlation, or a weak correlation, between health expense and the decision to retain or dismiss the employee, this may indicate health expenses were not a factor.

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- Whether there was a precipitous increase in the employee's health expenses.

Evidence related to pension plans can include:

- The identity of personnel who administer the plan and who have access to participant benefit information.
- The decision-makers' knowledge of:
  - Pension plan provisions.
  - (Or perception of) the employee's salary, benefit accrual and vesting status.
- How closely the company monitors each participant's pension benefit accruals, the employer associated cost, and to whom this information is reported.
- Whether the company forecasts each participant's pension benefits or analyzes the data in the aggregate.
- The trajectory of the company's pension obligations. If the company has many employees who are not vested, and will soon face a large pool of vested participants, this may indicate a desire to reduce or avoid this expense.
- The benefit accrual and vesting status of the terminated employee or employees vis-a-vis employees who were retained by the company. This may indicate whether pension obligations were a salient factor in dismissing some employees but not others.
- The vesting schedule used and the employee's benefit accrual and vesting status. A termination just before the employee vests on a 3-year cliff vesting schedule may suggest different motivations than a dismissal made on a graded-vesting schedule.
- Whether the company has previously adapted to rising costs by amending the plan to reduce future pension benefit accruals. This would indicate a familiarity with lawful procedure to reduce pension costs.

WHAT TO DO?

Economists indicate that the economy has improved and will improve in the near term, although high jobless rates may persist. Unfortunately for employers, a rise in ERISA section 510 actions may likely persist as well. If you are contemplating laying off or terminating any employee who represents the potential for an ERISA section 510 claim, you should consult with your benefits attorney before you take any action.

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