retirement
plan news

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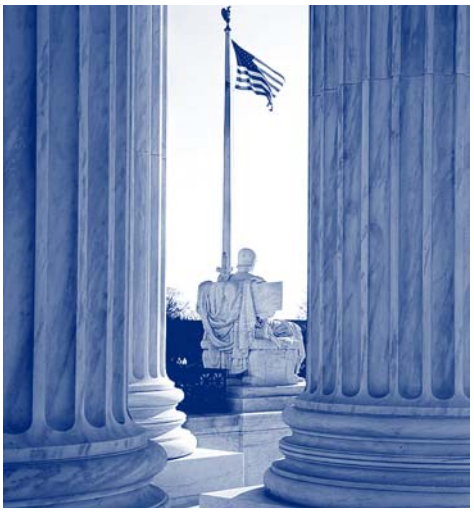
Supreme Court Rules in Divorced Beneficiary Case

In a 9-0 decision, the Supreme Court has ruled that the DuPont Company acted correctly by paying a deceased worker's retirement benefits to his ex-wife, even though she had previously waived her right to the benefits as part of their divorce settlement. (*Kennedy v. Plan Administrator for DuPont Savings and Investment Plan* No. 07-636, January 26, 2009)

The case illustrates the importance of asking participants to update their beneficiary designation forms following a life changing event. Some administrators suggest asking for a new beneficiary form once every five years.



Ordinarily, in order for a qualified plan to pay out a benefit to a former spouse, a domestic relations order (DRO) must be issued by a court and reviewed by the plan's representative to determine if it is a qualified domestic relations order (QDRO). The question before the Supreme Court in this case was not just whether a former spouse could waive some or all benefits without a QDRO (which the court ruled could be done), but whether a former spouse who is the named beneficiary could use a divorce decree to waive his or her right to benefits under the plan when that process does not conform with the plan's procedures for waiving a beneficiary's benefits. Note that the divorce decree in this case did not name an alternate payee nor did it set up "segregated amounts" that would have to be paid to an alternate payee under a QDRO.

Background. The participant initially completed a beneficiary form electing his wife as primary beneficiary for his savings and investment plan (SIP) benefits in 1974. They later divorced, but he failed to designate a new beneficiary after the divorce was finalized in 1994. Upon his death in 2001, his daughter requested that DuPont distribute the plan benefits to the estate. However, in accordance with the beneficiary form that was on file, DuPont paid the benefits to his ex-wife. The estate then sued in an attempt to recover the $400,000 that was distributed to the ex-spouse, claiming she had waived her right to the benefits in the divorce.

Justice Souter delivered the Supreme Court's opinion. He started with the basic Employee Retirement Income Security Act (ERISA) principle that a plan administrator is obligated to manage an ERISA plan "in accordance with the documents and instruments governing" it. "The Estate's claim therefore stands or falls by 'the terms of the plan'. . . a straightforward rule of hewing to the directives of the plan documents that lets employers 'establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits.'" (*Egelhoff v. Egelhoff*)

By giving plan participants a clear set of instructions that explain what participants must do to make their own instructions clear, "ERISA forecloses any justification

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for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: 'simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules.'" (*Fox Valley & Vicinity Const. Workers Pension Fund v. Brown*)

Less-certain rules would be costly. Plan administrators would have to "examine a multitude of external documents that might purport to affect the dispensation of benefits," (*Altobelli v. IBM Corp*) "and be drawn into litigation like this over the meaning and enforceability of purported waivers. The Estate's suggestion that a plan administrator could resolve these sorts of disputes through interpleader actions merely restates the problem with the Estate's position: it would destroy a plan administrator's ability to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court."

The DuPont plan document clearly states that a participant has the power both to designate any beneficiary or beneficiaries to receive all or part of the funds upon the participant's death, and to replace or revoke such designation. The plan requires all authorizations, designations, and requests concerning the plan to be made by employees in the manner prescribed by the plan administrator. Thus, the Court held that the plan administrator was correct to disregard the waiver in the divorce decree because it was in conflict with the beneficiary designation made by the former husband in accordance with the plan documents.

It should be noted that the decedent did file a new beneficiary designation naming his daughter Kari as the beneficiary under DuPont's *separate* pension and retirement plan, and it was honored. ❖

Penalty for Failing To Disclose Documents

The Department of Labor (DOL) has issued a final regulation authorizing the Secretary of Labor to assess civil penalties (not to exceed $1,000 per day for each violation by any person) against plan administrators who fail to disclose certain documents to participants and beneficiaries as required by the Employee Retirement Income Security Act (ERISA) and amended by the Pension Protection Act (PPA).

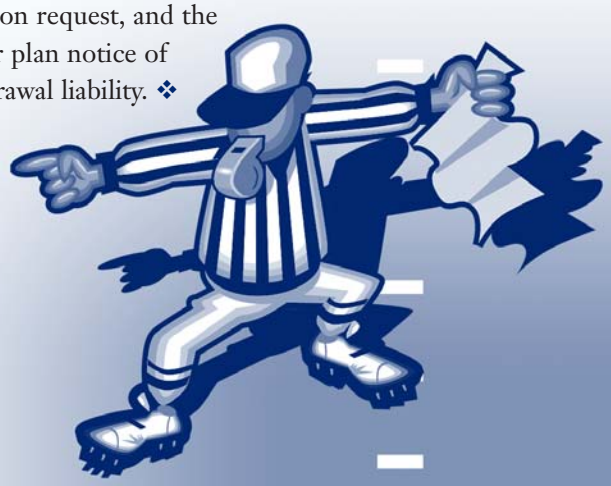
Prior to assessing a penalty, the DOL will provide the plan administrator with written notice of intent. The notice will include the amount of the penalty, the number of individuals upon which the penalty is based, the period to which the penalty applies, and the reason(s) for the penalty. In determining the penalty, the DOL will "[take] into consideration the degree or willfulness of the failure or refusal."

Plan administrators will have 30 days to file a written statement or request a hearing to present mitigating circumstances for noncompliance. If a statement is filed, the DOL will review it and notify the administrator of its decision to waive the penalty, in whole or in part, and/or assess a penalty. Failure to timely file a statement or request will waive the administrator's right to contest the notice and will be an admission of the facts alleged in the notice. Such notice then becomes a final order of the Secretary 45 days from the date the notice was served.

If more than one person is responsible (as administrator) for the failure to provide the required item(s), all such persons shall be jointly and severally liable. The penalty may not be a liability of the plan; the person(s) responsible will be held personally liable for paying the penalty.

One example of an applicable notice is the automatic contribution arrangement notice, which spells out a participant's rights and obligations. Each participant to whom the arrangement applies is to receive the notice prior to becoming eligible for the plan, and then at a reasonable time prior to the start of every plan year (e.g., 30 days).

Several defined benefit plan disclosures are also subject to civil penalty, including the notice of funding based limitation, the multi-employer pension plan notice regarding information made available on request, and the multi-employer plan notice of potential withdrawal liability. ❖



Stopping a Matching Contribution

The challenging economic times have made it imperative for many employers to consider cutting benefits that were previously regarded as necessities for companies that wanted to compete for and retain talented employees. Eliminating a matching 401(k) plan contribution is one example. The issue has raised a number of questions.

If an employer is going to stop a discretionary match that has been given on an annual basis for a number of years, must employees be informed before the plan year begins?

No. Although it may seem strange in this world of full disclosure, by definition, a discretionary contribution allows an employer to decide each year whether to make a matching plan contribution and then inform the plan participants. There is no legal requirement to give a notice when such a contribution will not be made; it may be discontinued or modified without prior notification. However, many employers do inform their employees to soften the blow to morale that a lack of communication may cause.

Many employers provide the same discretionary matching contribution year in and year out. Although this makes it easy for employees because they know what to expect, it makes it difficult for employers to retain the flexibility *not* to make such contributions. Some employers inform their employees before the first day of the plan year that they will not be making a discretionary matching contribution, thus permitting employees to adjust the amount of their deferrals.

What is the procedure for stopping a matching contribution?

To remove a fixed matching formula that is written into a plan document, a plan amendment is required, and employees must be informed of such an amendment through either a new Summary Plan Description (SPD) or a Summary of Material Modifications (SMM). Strangely, the deadline for providing an SMM is 210 days after the close of the plan year in which the employer makes the amendment, which is likely to be long after the participant receives their benefit statement showing that no contribution was made.

There is no need to amend a plan document that already reflects a discretionary contribution. However, if an employer is going to make a discretionary contribution — especially if the amount is different from prior years — it is important for the employer to timely adopt a board resolution stating the decision to make a discretionary contribution and include, if appropriate under the terms of the plan, the allocation formula for any discretionary matching or profit sharing contribution. Under Rev. Proc. 2005-66, this resolution generally should be adopted prior to the last day of the plan year for which such contribution will be made. In many cases, the employer does not actually determine the contribution amount until after profitability for the year has been determined. It is permissible for the employer to include a statement in the board resolution saying that the formula will be used each subsequent year until there is a board resolution superseding the formula.

May an employer amend a plan and remove a match that is written into the plan document after the plan year has started?

Yes. However, if the allocation requirement (such as employment on the last day of the year) has already been met, then the matching contribution must be made through the amendment date. Thus, the amendment must be prospective. However, if the allocation requirement has not been satisfied, then the amendment can be made with retroactive effect. Note that different rules apply to safe harbor 401(k) plans, where 30 days' advance notice must be given before the amendment becomes effective.

If the employer matches on a payroll-by-payroll basis, may the match be stopped?

Again, this may only be done prospectively. Thus, it is a poor plan design to require employment on the last day of the year but allocate on a payroll-by-payroll basis. Proper design dictates one or the other. ❖

recent developments

Fee Disclosure Regulations Withdrawn. As is common prior to a change of administrations in Washington, the Bush Administration tried to push through several regulations, some required by statute, by the time it left office. Many regs did not make it through the review and release process, and it's possible that some unissued regs may be withdrawn.

In particular, we are looking at several Department of Labor (DOL) regs regarding disclosure. In December 2007, the DOL issued its ERISA 408(b)(2) regulations relating to vendor disclosure to employer sponsors about fees being earned and potential conflicts of interest that the vendor may be involved with. In July 2008, the DOL issued additional regulations about fees charged against employee accounts. Neither set of regulations was finalized in time, and some press reports said they would be withdrawn. At a minimum, they will probably be reviewed and revamped by the new DOL leadership.

The DOL also issued guidance on the PPA provision allowing vendors to provide investment direction. Despite being drafted originally by Congress, this proposal will have major opposition from the Hill and will likely see substantial revamping. Also, regulations dealing with participant statement requirements are still not in the DOL's work plan, even though they were required (by statute) to be finalized by August 2007.

DB Funding Notice Guidance. DOL Field Assistance Bulletin (FAB) 2009-01 provides guidance and model notices to assist all defined benefit plans with the annual funding notice requirements from PPA (effective for plan years beginning on or after January 1, 2008). The funding notice replaces the summary annual report (SAR) requirement for DB plans subject to oversight by the Pension Benefit Guaranty Corporation (PBGC). The new notices must be furnished to the PBGC, to each participant and beneficiary, and to labor organizations representing participants. The annual notice must include, among other things, the plan's funding percentage, a statement of the value of the plan's assets and liabilities, a description of how the assets are invested, and a description of the benefits that are eligible for PBGC's guarantee. Plans generally must furnish funding notices no later than 120 days following the close of each plan year. For small plans (fewer than 100 participants), the deadline is the earlier of the due date or the actual filing date of the plan's Form 5500. ❖

The general information in this publication is not intended to be nor should it be treated as tax, legal, or accounting advice. Additional issues could exist that would affect the tax treatment of a specific transaction and, therefore, taxpayers should seek advice from an independent tax advisor based on their particular circumstances before acting on any information presented. This information is not intended to be nor can it be used by any taxpayer for the purpose of avoiding tax penalties.

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