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BENEFITS REPORT

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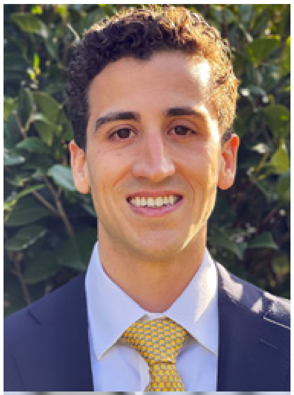
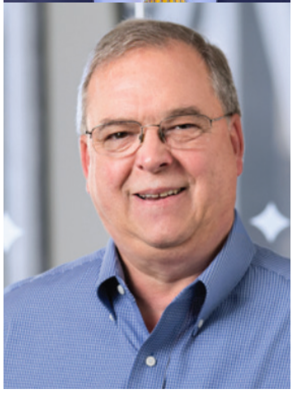
Ninth Circuit Approves ERISA Forum Selection Clauses





NICOLAS DEGUINES AND
R. BRADFORD HUSS

JUNE 2021

The United States Court of Appeals for the Ninth Circuit, in the recent case of *In re Becker*, No. 20-72805, 2021 WL 1219745 (9th Cir. Apr. 1, 2021), upheld the use of forum selection clauses in Employee Retirement Income Security Act of 1974 (ERISA) governed plans as valid and enforceable. A forum selection clause is a provision in a contractual agreement that designates the court and location where the parties have agreed to have their legal disputes litigated.

The plaintiff in *Becker* is a retired participant in the Wells Fargo 401(k) plan. The plaintiff filed suit, alleging ERISA fiduciary violations, in the Northern District of California, where the plaintiff had worked. The 401(k) plan document contained a forum selection clause for the District of Minnesota, where the plan is administered. Wells Fargo filed a motion to transfer the venue of

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the case to the District of Minnesota, which the district court granted. The plaintiff then requested a writ of mandamus asking the Ninth Circuit to rescind the transfer of venue. The Ninth Circuit denied the petition.

In deciding the case, the Ninth Circuit started with one of the many goals of ERISA: to provide "ready access to the Federal courts." 29. U.S.C. § 1001(b). Under ERISA § 502(e), a suit "may be" filed in three different venues: (1) where the plan is administered; (2) where the breach took place; or (3) where the defendant resides or may be found. 29 U.S.C. § 1132. The Ninth Circuit held that while ERISA suits may be brought in all three of these venues, it is not required under ERISA that all three venue options always be available. Here, according to the court, the plaintiff and Wells Fargo, through the plan document, simply agreed to bring all suits in one of the valid venues under ERISA (in this case, where the plan is administered).

The Ninth Circuit reasoned that forum selection clauses in ERISA plans do not undermine ERISA's goal of providing access to the federal courts; the clause actually guarantees access to a federal court and predictability. *In re Becker* at 2. "By funneling all Plan oversight through one federal court, it 'encourages uniformity in the decisions interpreting that plan'." *In re Becker* at 2 (quoting *Rodriguez v. PepsiCo Long Term Disability Plan*, 716 F.Supp.2d 855, 861 (N.D. Cal. 2010)). This leads to decreased costs for plan participants, another goal of ERISA.

In its opinion, the Ninth Circuit also cited its recent decision in *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1109 (9th Cir. 2019), in which the court held that access to federal court is not always required in an ERISA claim concerning a 401(k) plan. Wells Fargo could have foreclosed access to any federal court by including an arbitration clause in its plan document. *In re Becker* at 2.

Lastly, the Ninth Circuit acknowledged that its decision is in line with other circuits that have ruled on ERISA forum selection clauses. In *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, (6th Cir. 2014), the Sixth Circuit declined to adopt the Department of Labor's position opposing forum selection clauses. Further, that court held that forum selection clauses added after retirement are enforceable. In *George W. Mathias, Petitioner v. United States District Court for the Central District of Illinois, et al.*, 867 F. 3d 727 (7th Cir. 2016), the Seventh Circuit held that nothing in ERISA "precludes the parties from contractually channeling litigation to a particular federal district. Nor is contractual forum selection incompatible with ERISA's policy goals more generally."

While the Sixth, Seventh and Ninth Circuit Courts of Appeals have upheld forum selection clauses in ERISA plans, some district courts have not in certain situations. For example, in *Dumont v. PepsiCo., Inc.*, 2016 WL 3620736 (D. Me. June 29, 2016), the court declined to transfer venue out of fundamental fairness to the participant. In *Dumont*, a forum selection clause was added to the plan document after the participant was fully vested and had already worked 31 years at the company. The court held that enforcing the forum selection clause would mean that the participant could not sue for benefits in the district where the participant lives — their most ready federal court. *Dumont* at 220. The court acknowledged that although there are many competing policy considerations, "enforcement of the forum selection clause would run afoul of the strong ERISA public policy in favor of ready access to the federal courts." *Id.*

As can be seen from the cases above, forum selection clauses in ERISA plans have both pros and cons for participants and plan sponsors. While they help create efficiencies for plan sponsors and predictability in the courts, they can be perceived as unfair to participants. Plan sponsors should review all of these issues prior to implementing forum selection clauses in their plans.

Chambers USA 2021 Recognizes Trucker ✦ Huss

Chambers and Partners, USA has released its 2021 list of law firm and attorney rankings in the United States. Trucker Huss is pleased to announce it has been recognized in Band 2 for Employee Benefits & Executive Compensation in San Francisco, Silicon Valley & Surrounds. The prestigious Chambers rankings are driven by independent interviews with clients and members of the legal community at outside law firms.

Chambers USA recognizes Trucker Huss as "A highly rated employee benefits and ERISA boutique offering expert advice to Fortune 50 companies, small businesses and plan service providers. Wide-ranging knowledge in all aspects of employee benefit work."

In addition to the firm's ranking, Trucker Huss Directors **R. Bradford Huss**, **Kevin E. Nolt** and **Mary E. Powell** are recognized as leading lawyers for Employee Benefits & Executive Compensation in San Francisco, Silicon Valley & Surrounds.

FIRM NEWS

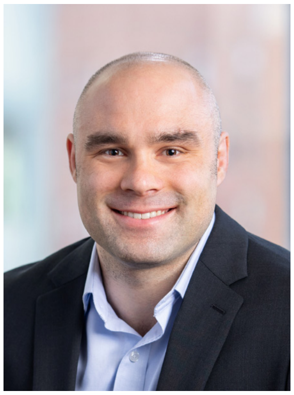
On May 11, **Catherine Reagan** was quoted in a Bloomberg Law News article entitled, *Your 401(k) Data Is Fair Game for Cross-Selling, for the Moment.* Catherine provided insights on what she calls the next major case, *Berkelhammer v. ADP TotalSource Group Inc.,* regarding a retirement industry that increasingly relies on participant data to market financial wellness programs.

On June 2, **Clarissa Kang** and **Tiffany Santos** participated in the ABA Employee Benefits Spring Update 2021: 6-Part Webinar Series (ongoing through June 16). The series addresses the impact of the newest tax reform legislation and other recent developments in all aspects of employee benefits.

- Tiffany was a panelist for the first session of the series, *Hot Topics for Health and Welfare Plans,* on Wednesday, June 2 from 9:00–10:30 a.m. PDT.
- Clarissa spoke on the second panel of the series, *Minimizing Risk: Recent Trends in Benefit Plan Design and Service Provider Agreements,* on June 2 from 11:00 a.m.–12:00 p.m. PDT.

On June 11, **Kevin Nolt** will be presenting at the CalCPA Employee Benefit Plans Audit Virtual Conference. Kevin's section (from 3:20–4:10 p.m. PST) titled *EBP Relief: Fixing Pain Points*, will discuss the most common compliance errors identified during a plan audit and how such errors should be corrected.

IRS Q&As Clarify COVID-19 Partial Plan Termination Relief



BRYAN J. CARD

JUNE 2021

On April 27, 2021, the Internal Revenue Service (IRS) published guidance in the form of five questions and answers (the "Q&A Guidance") on the partial plan termination relief provided under the Consolidated Appropriations Act, 2021 (the "Act"), which was signed into law on December 27, 2020. This partial plan termination relief provided under the Act was enacted to help alleviate economic hardships faced by plan sponsors who were forced to temporarily reduce their workforce in response to the COVID-19 pandemic. This article begins by discussing the partial plan termination rules and the partial plan termination relief provided under the Act. The article then discusses the IRS's Q&A Guidance and the questions that remain unanswered following the issuance of the Q&A Guidance.

Partial Plan Terminations

When a qualified defined contribution or defined benefit plan experiences a partial plan termination, the affected employees are 100% vested in their plan benefits. A partial termination occurs when there is a significant reduction in the number of covered participants either due to their involuntary termination of employment (e.g., lay-off) or a plan amendment. Whether a partial termination has occurred is a facts-and-circumstances determination but as a general rule, the IRS has provided that if 20% or more of all active plan participants, including both vested and non-vested participants, cease to be covered by the plan in a plan year (the applicable measuring period may be longer if the employer-initiated events are part of a series of related events, such as layoffs triggered by the same business circumstances that stagger two plan years), then there is a rebuttable presumption that a partial termination has occurred.

Example: As of March 13, 2020, ABC, Inc. employs 200 active plan participants. ABC, Inc. sponsors a 401(k) plan, which features a matching contribution subject to a four-year graded vesting schedule. The plan is a calendar-year plan. On April 1, 2020, ABC, Inc. lays off 50 active plan participants, and does not hire or rehire any employees for the rest of the 2020 plan year.

In this example, the plan has likely incurred a partial plan termination because over 20% of ABC, Inc.'s active participants have been involuntarily terminated for the 2020 plan year. The terminated participants will be 100% vested in their matching contributions to the extent they are not already vested in such contributions.

Partial Plan Termination Relief Under the Act

In an effort to provide relief to plan sponsors negatively impacted by the COVID-19 pandemic, the Act modified the applicable measuring period for determining whether a partial plan termination had occurred. Specifically, the Act provided that a plan shall not be treated as having a partial termination during any plan year which includes the period beginning on March 13, 2020 and ending on March 31, 2021, if the number of active participants covered by the plan on March 31, 2021 is at least 80 percent of the number of active participants covered by the plan on

March 13, 2020 (the "80% test"). The result is that a plan sponsor that laid off a significant number of employees due to the COVID-19 pandemic can avoid a partial termination (and the requisite 100% vesting) if it hires new employees or rehires previously employed employees and enrolls them in the plan before March 31, 2021.

Continuing with the example above: Let us assume that on March 1, 2021 ABC, Inc. hires and/or rehires 20 employees, all of whom are eligible to begin participating in the plan immediately; and thus, as of March 31, 2021, ABC, Inc.'s active participant count is 170. Because of the relief provided under the Act, the plan has not incurred a partial plan termination because on March 31, 2021 the plan will cover at least 80% of the active participant count on March 13, 2020.

The Q&A Guidance

Although the relief provided under the Act was well received by both plan sponsors and employee benefits practitioners, many questions remain unanswered as to how plan sponsors should implement the relief. As such, the IRS issued the Q&A Guidance, which answered the following questions:

Who is an active participant for purposes of the partial plan termination relief?

In the Q&A Guidance, the IRS does not provide the specific definition plan sponsors must use in determining who is an active participant for purposes of applying the partial plan termination relief under the Act; but it stated that plan sponsors should use a reasonable, good faith interpretation of the term "active participant covered by the plan" in a consistent manner when determining the number of active participants covered by the plan on March 13, 2020 and March 31, 2021.

Which plan year(s) does the partial plan termination relief apply to?

The Q&A Guidance states that if any part of the plan year falls during the period of March 13, 2020 to March 31, 2021, then the relief applies to the entire plan year. Therefore, for calendar-year plans this would include the entire 2020 and 2021 plan years (i.e., the period before March 13, 2020 and the period after March 31, 2021).

For purposes of applying the 80% test, do the participants covered by the plan on March 31, 2021 need to be the same participants covered by the plan on March 13, 2020?

No. In the Q&A Guidance, the IRS states that the plan should apply the 80% test using the total active participant count on March 13, 2020 and March 31, 2021 — and that the active participants on March 31, 2021 need not be the same active participants covered by the plan on March 13, 2020. In other words, active participants who are new hires or rehires should be included in the active participant count for purposes of applying the 80% test.

Does the employer's workforce reduction need to be related to COVID-19?

No. In the Q&A Guidance, the IRS specifies that the employer's workforce reduction does not need to be related to the COVID-19 pandemic in order for the employer to utilize the relief. This means that the 80% test applies regardless of the reasons for workforce reduction.

Unanswered Questions Regarding the Retroactive Application of the Relief

Based on the guidance issued thus far, it is not clear whether the IRS will allow plan sponsors to rely on the relief if the plan sponsor vested affected participants as a result of a partial plan termination prior to the enactment of the Act. If plan sponsors can rely on the relief, then that raises the question of whether it must be applied to all affected participants.

If the relief must be provided to all affected participants, then the participants who took a distribution will have received an overpayment — which requires plan sponsors to attempt to recover the overpayments and to contribute any unrecovered amounts to the plan. The administrative complexity and costs associated with this approach would likely negate any benefit provided under the Act, and plan sponsors may simply decide not to rely on the relief.

The other option is to limit the relief only to those participants who did not take a distribution. This would result in reapplying the vesting schedule only to participants with a current account in the plan and permitting the participants who took distribution to retain their full benefit. The rationale for this approach is that the distributions were made in accordance with the law at the time. It is not clear whether the IRS would permit this approach, and it also could raise employee concerns because they are not being treated in the same manner.

Further guidance is needed on these issues and until such time, plan sponsors impacted by the relief should reach out to legal counsel.

If you have any questions regarding the relief or any other matter, please contact us. We are continuing to monitor all benefits-related developments relating to the COVID-19 pandemic.

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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