



Second Circuit Clarifies Standards for Liability Based on Flawed Summary Plan Descriptions

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No company's benefits department is perfect – and some fall far short of the ideal. As a result, oversights and errors in the compilation and distribution of summary plan descriptions (SPDs) required under the Employee Retirement Income Security Act of 1974 as amended (ERISA) crop up with fair frequency. These mistakes may result in employees foregoing available benefits or making other ill-advised choices, which ultimately give rise to litigation.

When faced with plan sponsors' errors in creating or distributing SPDs, courts have at times proven unforgiving. Last year, resolving confusion among the Circuit's lower courts, the U.S. Court of Appeals for the Second Circuit "squarely decided" that, to recover plan benefits based on a deficient SPD, a plaintiff must demonstrate that she was "prejudiced." *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2d Cir. Jul. 17, 2003). With that decision, the Second Circuit joined the group of other federal courts that have rejected any requirement that a beneficiary show "detrimental reliance" on the deficient SPD to recover benefits.

Plaintiff Challenged Benefits Decision in Court

After denial of survivor income benefits, Plaintiff Sally Burke sued the Retirement Income Plan (the "Plan") funded and administered by her deceased husband's employer, Eastman Kodak Company ("Kodak"). The committee that administered the Plan found that Mrs. Burke was not eligible for benefits because she and her husband had been married for less than six months at the time of his death, and one year of marriage or domestic partnership status was a requirement for eligibility under the Plan. Although the Burkes had been living together as domestic partners for the nine years before they married, they had not completed the affidavit that was a prerequisite for domestic partnership status to be recognized under the Plan.

Kodak's SPD described all the employee benefit plans that the company sponsored. The Plan provided, and Kodak believed, that the affidavit requirement applied to the Plan. Although the affidavit requirement was set forth in 16 different places in the SPD, the requirement did not appear in the section of the SPD pertaining to the survivor income benefit that Mrs. Burke sought.

After the Plan administrator denied Mrs. Burke's application for benefits, she unsuccessfully pursued an administrative appeal. Mrs. Burke then sued Kodak and the administrative committee, arguing that the affidavit requirement should not have been imposed against her because the SPD was deficient. The district court granted summary judgment to Kodak, holding that Mrs. Burke had failed to comply with the domestic partnership affidavit requirement and that she had failed to demonstrate detrimental reliance on the allegedly deficient SPD. Mrs. Burke appealed.

Kodak's SPD Did Not Satisfy ERISA's Requirements

The Second Circuit held that Kodak's SPD failed to comply with ERISA's requirements. The appellate court observed that the Department of Labor regulations issued under ERISA require that: "(1) the SPD's format not mislead or fail to inform participants and beneficiaries about the plan; and (2) any limitations or restrictions of plan benefits must not be minimized, rendered obscure, or otherwise made to appear unimportant." 336 F.3d at 110 (citing 29 C.F.R. § 2520.102-2(b)).

With respect to the survivor income benefit, the appellate court held that Kodak's SPD was deficient because it failed to mention the affidavit requirement or even to cross-reference to other sections setting forth that requirement. *Id.* at 111. Although a domestic partnership affidavit was required under the terms of the Plan, that requirement could not be enforced against Mrs. Burke because it was not disclosed in the relevant section of the SPD. As a general rule, "[w]here the terms of a plan and the SPD conflict, the SPD controls [because] the SPD 'will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary.'" *Id.* (internal citations omitted).

Plaintiff Was Prejudiced By The Deficient SPD

Federal appellate courts are divided over whether a showing of detrimental reliance or prejudice is required to recover benefits in cases concerning deficient SPDs. The Third, Seventh and Eleventh circuits require that a plaintiff show he relied to his detriment on errors in an SPD. The First, Fourth, Eighth and Tenth circuits allow recovery based on a showing of prejudice *or* detrimental reliance. "Detrimental reliance" is demonstrated by an "affirmative showing" that the plaintiff "read the SPD and that but for the inaccurate description he would have acted differently." The Second Circuit viewed this standard as imposing an "insurmountable hardship" on plaintiffs.

The Second Circuit concluded that the prejudice standard "is more consistent with ERISA's objective to protect the employee against inadequate SPDs." *Id.* at 112. Recognizing that prejudice was an "amorphous" standard, the Second Circuit explained that, to meet the test, a plan participant or beneficiary must show that he "was *likely* to have been harmed as a result of a deficient SPD" (emphasis in original).

An employer or plan sponsor may then rebut the initial showing of prejudice by offering evidence that the deficient SPD was "harmless error." *Id.* at 113. For example, an employer could provide evidence that the participant or beneficiary was otherwise aware of the requirement that was omitted from the SPD.

In Mrs. Burke's situation, the Court held that the affidavit requirement's "conspicuous absence" from the SPD's discussion of the survivor income benefit likely led the Burkes to believe that the requirement did not apply. Thus, they were prejudiced by having benefits denied based on that requirement.

Employers Can Limit Their Exposure To Claims based on Deficient SPDs

The Second Circuit's decision in *Burke* underscores that it is crucial for employers to create and distribute *accurate* SPDs regarding the benefit plans they sponsor. Congress and the Department of Labor have set forth specific, detailed requirements for what must be included in an SPD, and how it must be presented. Among other things, SPDs must be drafted so that the average plan participant understands the terms of the plan.

As *Burke* demonstrates, regardless of how carefully the plan itself has been drafted, when a plan participant relies on an erroneous SPD, courts may treat the SPD as the only meaningful document. In such instances, courts may limit their attention to those plan terms that were shared with the employee.

Employers seeking to avoid liability for faulting SPDs should consider taking the following steps:

- Create (or, where applicable, obtain from the insurer) an SPD for each employee benefit plan. Confirm that each SPD meets the requirements set forth in ERISA and the Department of Labor's regulations.
- Ensure that the SPD for each benefit is *complete* and *accurate*, and that it does not conflict with any of the terms in the governing plan document.
- Consider inserting language into the SPD to provide that the plan document will control even if there exists a conflict between the plan document and the SPD. Courts are split as to the effect of such a disclaimer. The Third and Tenth Circuits have given effect to such disclaimers, while the Fourth, Fifth, and Eleventh Circuits have declined to do so.
- Have plan administrators and/or claims administrators review the SPD to verify that their practices comport with its terms.
- Establish procedures to distribute the SPD to *all employees* (including new hires) who are eligible for participation in the plan. These procedures should be designed to ensure that each employee *actually receives* the SPD, and that the plan sponsor can evidence such receipt.
- Follow up with employee when required documents are not received. Diligent follow-up can demonstrate compliance with ERISA's fiduciary duties even in the absence of an SPD. *See Weinreb v. Hospital for Joint Diseases Orthopaedic Institute*, 285 F. Supp. 2d 382 (S.D.N.Y. 2003).

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Client Alert

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