

Keeping Lawyers Out of Your Benefit Plans

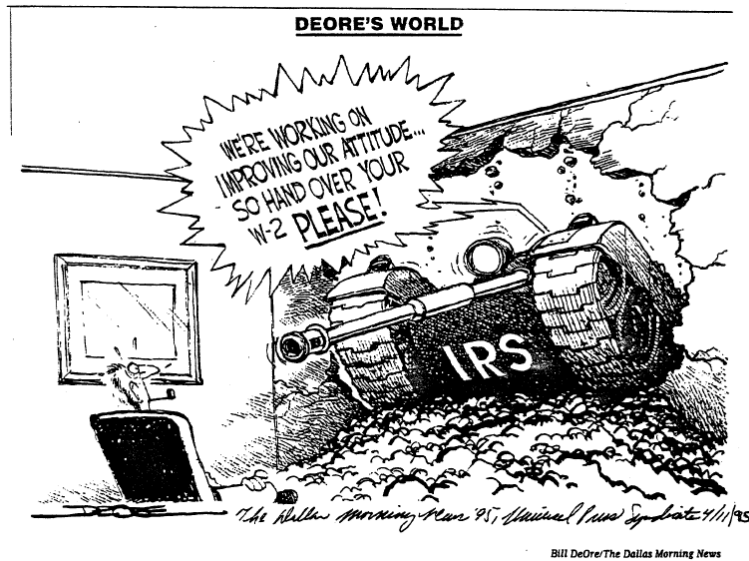
Dentons' CLE Seminar for In-House Counsel

T. David Cowart

October 2, 2018

Copyright© 2018 by T. David Cowart. All rights reserved

1 DENTONS



2 DENTONS

“Keeping Lawyers Out...”

The title suggests I am going to tell you how to win lawsuits against your benefit plans.

- There will be a little of that.
- There will be more than that.

The real primary focus of this presentation is...

- How to set up your benefit plans without me.
- How to operate your benefit plans without me.

“Keeping Lawyers Out...”

ERISA work done by siloed, highly-trained, expensive ERISA lawyers used to be the norm for most companies.

- ERISA work was once the purview of a small cadre of specialists.
- Routine needs have become more of a commodity.

Today much of the work involved to set up and operate many benefit plans has become more standardized.

- A network of alternative providers for a wide variety of situations has grown up.
- Those providers are too often cheaper than an ERISA lawyer.

What would I advise you to do?

Retirement Plans - Set up

Avoid defined benefit plans (especially big old ones) religiously.

Avoid ESOPs (employee stock ownership plans).

For a 401(k) plan,

- Look for a service provider (often a third party administrator or TPA) that offers a prototype plan or a volume submitter plan.
- See if the essential design elements you want for your 401(k) plan can be accommodated in the TPA's adoption agreement.
 - There will be limits on your allowed design choices.
 - Most adoption agreements allow most legally available choices. Many have instructions explaining the choices to the careful reader.

Retirement Plans - Set up

- A retirement plan is a contract under Federal law.
- After the new plan's adoption agreement is completed under the oversight of your most knowledgeable internal benefits expert, it should be signed by someone within the organization who is authorized by your policies and procedures to commit you to a contract with this level of expenditure commitment.
- Board of Directors (or Managers) involvement is not required by ERISA, but your organization may require it.
- Use all of the law's safe harbors you can live with in the design of the plan. Each safe harbor avoids testing every year.
- Do not exclude any categories of employees from being eligible to participate.

Retirement Plans - Set up Issues

- A retirement plan document has to be updated periodically for changes in applicable law. Your provider should be aware of this and expressly assume this burden.
- 401(k) plans cannot be adopted retroactively. The plan document should be signed and adopted *before* the first salary deferral.
- If you are converting your existing 401(k) plan to this new format, be very careful, particularly concerning the no-cutbacks rule. The new provider should worry a lot about cutback risks.
- Look for clauses in the document requiring mandatory arbitration and a plan-based limitations period for filing claims for benefits and against fiduciaries.

Retirement Plans - Fiduciaries

- Fiduciaries run the plan, invest the plan's assets, resolve the plan's disputes and accept personal liability for their mistakes, all while trying to be more careful doing this side job than they are in their regular job. Choose them carefully.
- Consider a committee. Do not consider the plan's sponsor.
- The Plan Administrator will automatically be the plan's sponsor - by law - unless you choose someone else. Choose someone else. Otherwise, your employer will be a dreaded named fiduciary under ERISA.
- Retain experts when you are not sure what to do.

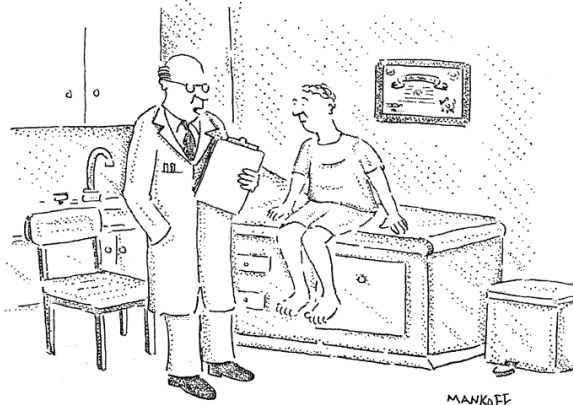
Retirement Plans - Fiduciaries

- For investing the assets of your 401(k) plan, choose:
 - 404(c) protection (participant direction of investment).
 - QDIAs (qualified default investment alternatives for default investors).
 - TDFs (target date funds).
 - Flat fees, instead of percentage-based fees.
 - Thoughtfully considered benchmarks, while being wary of the influence of “best practices.”
- Do **not** choose:
 - To invest in securities issued by the plan’s sponsor.
 - Revenue sharing without careful pre-investment scrutiny.
 - Investment alternatives for the plan without a searching, comparative inquiry into each selected alternative.

Retirement Plans - Fiduciaries

- Design ways to administer the plan’s investments and make other decisions with an eye to a “procedural prudence” defense.
- Purchase a process for continuously monitoring the suitability of the investment choices offered by the plan and the fees associated with them.
- Engage an independent advisor which will provide most of that procedural prudence and monitoring for you.
- Review and sign the contracts with the TPA and any advisor. Your recourse changes from legal malpractice claims to the liability agreed to in the contract. You want that liability clarified.
- Ensure the TPA who provides the plan document also provides a SPD - one every five years.
- Communicate with plan participants - carefully, completely and frequently. This is hard.

THE NEW YORKER



"Uh-oh, your coverage doesn't seem to include illness."

TUESDAY
JANUARY 2ND

11

DENTONS

Health Plans - Set up

- This market of providers is more fragmented and dominated by companies for whom ERISA compliance is a distant priority.
- There is much less consensus about how ERISA's document requirement is satisfied.
- Rely on a combination of the TPA's booklet, the SPD and (maybe) a wrap plan document, usually available from your health benefits provider, to be the health plan's formal document.
- Carefully consider embracing the transfers of risks that come from using a fully-insured arrangement.
- If your health plan will be self-funded, prefer a single TPA who has a variety of pre-established networks to administer it.
- A cafeteria plan will require its own, compliant document and cannot be adopted and executed retroactively.

Copyright© 2018 by T. David Cowart. All rights reserved

12

DENTONS

Health Plans - Compliance

- Get experienced TPAs who can help you provide:
 - COBRA coverage.
 - SPDs (summary plan descriptions).
 - SBCs (summaries of benefits and coverage).
 - HIPAA portability compliance.
 - HIPAA privacy and security protection.
 - HITECH data protection.
 - GINA, ADA and HIPAA nondiscrimination compliance.
 - MHPAEA compliance (mental health benefits).
 - Medicare Secondary Payer compliance.
 - Form 1095 and 1096 reporting of the health coverage you provide and its affordability under the ACA (Obamacare).

Health Plans - Compliance

- Get an experienced TPA who can help a plan fiduciary certify for 2019, under penalties of perjury, your health plan complies - each year - with the laws on the preceding slide (and more).
- Appoint and train fiduciaries to run the health plan, decide the most difficult claims, and communicate benefits. Your HR function can continue to design and improve the health plan separately.
- Retain a TPA to process claims (at least initial claims) who will assume and admit claims fiduciary status.
- Do not try to be grandfathered out of the ACA (Obamacare).
- Bookmark premiums paid by employees.
- Communicate with plan participants - carefully, completely and frequently. If you want to enforce a limit, communicate it. This is hard, too.



15

DENTONS

Both Kinds of Plans - Compliance

- Do not allow plan participants to get divorces. 😊
- Pray plan participants know who (and where) their spouse is.
- Do not let plan participants have children out of wedlock.
- Hire a TPA who has a rigorous, bordering on annoying, intake process.
- Buy fiduciary liability insurance. It is irreplaceable when you need it. It is in addition to ERISA's required fidelity bond; there are different insureds.
- Do not make special promises about providing future benefits if you buy a company.
- Choose someone internally to watch trends and developments, like...

Copyright© 2018 by T. David Cowart. All rights reserved

16

DENTONS

Student Loan Repayment Assistance

- 44 million Americans owe more than \$1.3T in student loan debt.
- These are younger workers and their older worker relatives.
- In 2015, more than 75% of young professionals surveyed said availability of employer-provided student loan repayment assistance would be a considerable factor in an employment decision.
- Virtually any kind of assistance offered by employers was (or should have been) taxable. Thus, only 4% of employers have an existing program.
- One company got IRS blessing this summer for a tax-deferred solution.

Student Loan Repayment Assistance - Proposal

- Abbott Laboratories got an IRS ruling which implicitly said that a student loan repayment assistance program could be tied to a 401(k) plan and explicitly ruled a particularly troubling rule was not a problem for Abbott's design.
Private Letter Ruling 2018-33-012 (May 22, 2018, released Aug. 17, 2018)
- Abbott's program:
 - It builds upon a 401(k) plan with a matching contribution.
 - It would add an Abbott-paid year-end contribution of 5% of pay for each employee who made a student loan repayment of at least 2% of pay in the year.
 - An employee's decision to use this benefit is individually voluntary, and an election to enroll can be changed prospectively at any time.
 - The employee does not have to contribute to the 401(k) plan to get this benefit. An affluent employee can make salary deferrals and get them matched, while also getting this loan repayment benefit.

Student Loan Repayment Assistance - Issues

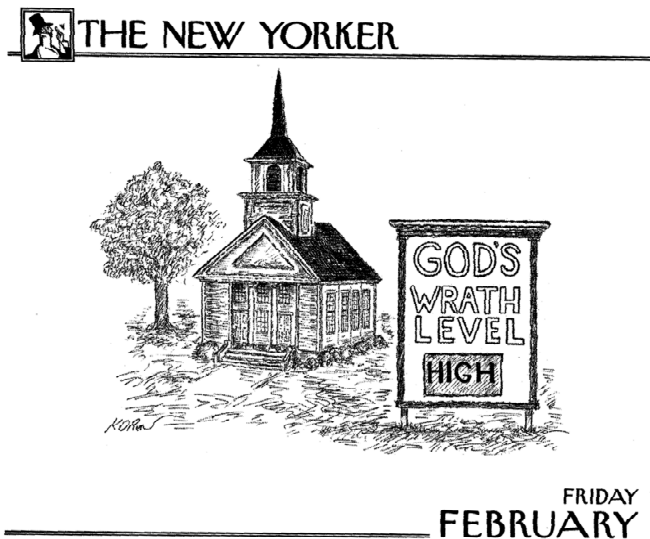
- Lots of 401(k) plan rules apply to the 401(k) plan contribution paid because student loan repayments were made.
- Lots of unanswered technical questions surround this and other options floating around. Despite assurances made to you, no one has all of the answers now.
- Abbott's program does not put immediate dollars into the debtor's hands.
- How (and how often) will Abbott police whether large enough loan repayments were actually made?
- An unexpected risk of loan repayment programs that are taxable is that they may have to be treated as regular wages that enter into overtime calculations under the FLSA.

FLSA, Benefits and Collective Actions

- As employee recruiting and retention benefits for millennials evolve, employers need to consider whether the newer, edgier benefits are bona fide benefit plans exempt from FLSA.
 - FLSA section 7(e)(2) (29 U.S.C. §207(e)(2)) exempts from FLSA's "regular rate of pay" items like "payments to an employee...not made as compensation for his hours of employment."
 - FLSA section 7(e)(4) (29 U.S.C. §207(e)(4)) excludes "contributions...to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees."

FLSA, Benefits and Collective Actions

- If your benefits are not exempt from FLSA, a risk is the value of the benefits will become part of the employee's regular rate of pay for such purposes as overtime calculations. See, e.g., ***Flores v. City of San Gabriel***, 824 F.3d 890 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017) (police officers awarded overtime calculated by treating cash received under cafeteria plan in exchange for declining medical benefits as part of their regular rate of pay).
- Other benefits at risk could include:
 - Student loan repayment benefits.
 - Tuition reimbursements.
 - Elder care.
 - Opt out payments in other forms.
- Collective actions have been brought seeking underpaid overtime.



Antitrust and Human Resources

- Antitrust laws protect employees too.
- Inappropriate discussions or agreements with other employers who want to attract employees like yours may violate antitrust laws.
"Antitrust Guidance for Human Resource Professionals" by Federal Trade Commission and Department of Justice's Antitrust Division (October 2016)
- Examples of violations include:
 - Wage-fixing agreements.
 - No-poaching agreements.
 - Sharing sensitive information (e.g., about terms and conditions of employment) with competitors (even just in surveys).
- Naked wage-fixing or no-poaching agreements are *per se* illegal, per the DoJ, so long as they are separate from a larger legitimate collaboration among the employers. DoJ has announced it intends to pursue these criminally.
- Aggressively broad non-compete/non-solicitation clauses in settlements of non-compete litigation with departing employees can be a *per se* no-poach violation, according to the DoJ.

Copyright© 2018 by T. David Cowart. All rights reserved

23

DENTONS

Recent No-Poach Civil Complaints

Examples include:

- *U.S. v. Knorr-Bremse & Westinghouse Air Brake Techs. Corp.*, No. 1:18-cv-747-CKK (D.D.C. filed April 3, 2018) (settlement with the DoJ announced April 2018).
- *In Re: Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-798 (W.D. Pa. filed Aug. 13, 2018) (consolidated class actions against Knorr-Bremse, Wabtec Railway and other rail companies).
- *Butler v. Jimmy John's Franchise, LLC*, No. 3:18-cv-133 (S.D. Ill. filed Jan. 24, 2018) (class action contesting franchisees' non-solicitation requirements and non-competes survived motion to dismiss).
- 11 state attorneys general reportedly sent letters in 2018 to eight fast-food chains demanding documents and information as they investigate the chains' alleged no-poach and non-compete agreements.

Copyright© 2018 by T. David Cowart. All rights reserved

24

DENTONS

Recent No-Poach Civil Complaints

Other examples include:

- *U.S. v. eBay, Inc.*, No. 5:12-cv-5869-EJD (N.D. Cal. filed Nov. 16, 2012).
→ *U.S. v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013) (denying motion to dismiss).
- *U.S. v. Lucasfilm Ltd.*, No. 1:10-cv-2220-RBW (D.D.C. filed Dec. 21, 2010).
- *U.S. v. Adobe Systems, Inc., Apple, Inc., Google, Inc., Intel Corp., Intuit, Inc., & Pixar*, No. 1:10-cv-1629-RBW (D.D.C. filed Sept. 24, 2010) (\$400M settlement of related private class action reportedly announced in 2015).

David Cowart
Dentons
2000 McKinney Avenue
Suite 1900
Dallas, TX 75201
214-259-0906
david.cowart@dentons.com