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INSIDE THIS ISSUE

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PROTECTING YOUR RETIREMENT PLAN IN A CORPORATE TRANSITION BY EDWARD MILLER

When companies go through any form of restructuring, retirement plans are often given limited attention. Merger discussions usually entail the future of the company, not the future of its retiring employees. Thus, elderly employees' pension plans can become an elephants in the board room. A recent *Wall Street Journal* article discusses this issue.

First and foremost, employees should meet with their retirement plan administrators frequently to obtain the most recent plan documents. Administrators are often skilled in human resources decisions, not financial or economic predictions, so employees should not rely on any representations that come from the meeting. Instead, a lawyer with financial planning abilities should look at the plan documents obtained from the administrator. Because plan administrators are not licensed securities advisors, and corporate trustees of retirement plans probably have thousands of accounts, it is important to have an individual review by a non-commissioned counselor.

Second, every employee should learn the vocabulary of the employee's retirement plan. What kind of plan is it? Many plans are defined contribution plans in which the investor, not the employer, bears the risk. These plans allow for both employer and employee contributions; however, the contribution is defined, the benefit is not. Even defined benefit plans can quickly change due to a company's bankruptcy or relationship with a union. Employees should also research tax implications and whether or not beneficiary designations are necessary.

Third, employees should continually remind themselves that annually distributed plan summaries are an *introduction* to their benefits, not the final verdict. A summary is simply a snapshot of current activity; it does not display how an economic or corporate change will alter the benefits of a plan.

Annual plan summaries and the predictions of plan administrators have put many retirees into troublesome situations lately. (*See CIGNA v. Amara*, No. 09-804 of the 2010 Term of the Supreme Court). After CIGNA converted its defined benefit pension plan to a cash balance plan, it issued a summary plan description (SPD) to plan participants. Plan participant Janice Amara brought a class action suit claiming that CIGNA's notice of the changes was improper, particularly because the new plan in certain respects provided employees with less generous benefits. After years of appellate litigation, the U.S. Supreme Court decided the CIGNA dispute.

The court held that although §502(a)(1)(B) of the Employee Retirement Income Security Act (ERISA) did not give the district court authority to alter CIGNA's plan, relief was authorized by §502(a)(3), which allows a participant, beneficiary, or fiduciary "to obtain other appropriate equitable relief" to redress violations of ERISA "or the [plan's]terms." The Court concluded that statements in the SPD "do not themselves constitute the terms of the plan for purposes of §502(a)(1)(B)." In short, a summary plan description that is wrong is not binding on an employer; thus, even if an employee thinks that the employee already has it in writing, the employee may not have enough to enforce the employer's promises.

What would be enough for a plan summary or a plan administrator's statements to be enforced? The Court discussed equitable remedies, specifically the appropriate equitable relief granted by ERISA: "Because §502(a)(3) authorizes 'appropriate equitable relief" for violations of ERISA, the relevant standard of harm will depend on the equitable theory by which the District Court provides relief. Potential equitable theories include estoppel, reformation, and surcharge. If the remedy is equivalent to estoppel, a showing of detrimental reliance must be shown." In summary, an employee would have to carefully document the employee's reliance on a plan, sit through litigation, and hope for the best if the employee relied on the words of an administrator instead of obtaining legal counsel.

Evaluating retirement plans can be challenging because of our busy lives, but the earlier this process begins, the more likely it is that an employee will successfully transition into the golden years. If you think you may need help starting your retirement evaluation and want an experienced elder law firm on your side, then contact Oast & Hook.

Edward Miller is a clerk at Oast & Hook. Mr. Miller is studying law at the University of Richmond School of Law.

Ask Allie

O&H: Allie, we've heard about an interesting study about children and pets. Please tell us about it.

Allie: Sure! A recent article on www.msnbc.com described the research results of the Detroit Childhood Allergy Study. The researchers studied 565 18-year-olds who had been followed since birth. They found that most children with pets in the home during the first year of their lives had a reduced risk of allergies. Both boys and girls with a cat in the home during the first year had about half the risk of being sensitized to cats later in life and boys with a dog at home during the first year had half the risk of being sensitized to dogs later in life. Girls with a dog at home during the first year had an increased risk of being sensitized later in life. Tolly Epstein, M.D., an assistant professor of immunology at the University of Cincinnati, said, "I thought it was a well-designed study, it was a thorough analysis. I don't think that it answers all of our questions about pet ownership, but I think they present some important findings." She agrees with other researchers that further study is needed. What an interesting study! Time to take a nap. See you next week!

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