

# Benefits Alert

August 2009

## Supreme Court's 'Plan Documents Rule' Gets Its First Hearing (Fiduciaries Win)

Earlier this year, the U.S. Supreme Court ruled that in determining to whom pension benefits are payable after divorce, a plan administrator must stick to the plan documents; external documents, such as a divorce decree, do not need to be consulted. A federal trial court has now applied this decision, and ruled in favor of a plan administrator and insurer that paid out life insurance proceeds in accordance with plan documents. (*Dunlap v. Ormet Corp., et al.*, D.C. N. W. Va., No. 5:08CV65, 2009)

### THERE'S NOTHING CERTAIN EXCEPT DEATH AND LAWSUITS

A widow alleged that she was the sole beneficiary of her deceased husband's life insur-

ance policy. She further alleged that three days before he died of cancer, and while he was hospitalized and disoriented, his stepson and daughter had him sign forms that made them and two other family members the beneficiaries of the policy. Benefits were paid in accordance with this beneficiary designation form. Thereafter, the widow sued the plan and the insurer, arguing that the plan had an obligation to investigate the facts and circumstances surrounding the change of beneficiaries.

Relying on the Supreme Court's decision, the plan and the insurer said that the money was disbursed according to the plan documents, and asked a trial court to dismiss the case. The court agreed. *Court:* The

### In This Issue

- Supreme Court's 'Plan Documents Rule' Gets Its First Hearing (Fiduciaries Win)
- HSAs Aren't A Tough Sell, If You Do It Right
- Your 401(k) Plan Continues To Tank. Here's What To Do Now
- EEOC Throws Monkey Wrench Into Health Screening Programs

corporate defendants did their statutory duty by paying benefits to the named beneficiaries in conformity with the plan documents. Neither the plan nor the insurer was required to consider external circumstances in light of the clear distribution instructions in the beneficiary designation form.

### IMPACT

This widow may yet have her day in court. But it will most



Robert S. Golden  
M. Dennis Guappone  
Stephen H. Peck

*Expertise*  
*Innovation*  
*Excellence*

181 Wells Avenue  
Newton, MA 02459  
Phone: (617) 969-0100  
[www.ubserv.com](http://www.ubserv.com)

## HSAs Aren't A Tough Sell, If You Do It Right

**H**ealth savings accounts (HSAs) are tax-favored accounts into which employees contribute on a pre-tax basis and out of which they can pay medical bills that aren't covered by insurance. Sounds great. The only drawback is that HSAs must be accompanied by high-deductible health plans. *Really* high-deductible health plans. This can present a communications challenge for you.

### COMBATING STICKER SHOCK

Companies are increasingly turning to HSAs and high-deductible health plans to rein in the cost of health benefits. Employees, on the other hand, aren't used to looking at deductibles in the thousands of dollars. That's in addition to co-pays and co-insurance. So it's no wonder that most employees believe that their health benefits are being cut when HSAs and high-deductible health plans enter the playing field.

One tried-and-true technique that's used to persuade employees to sign up for HSAs and high-deductible health plans is to offer an employer match. Another is to advance money to employees who need to pay medical bills before they've built up a sufficient balance in their HSAs. Employees pay back the company through payroll deductions. The major risk, however, is that the company will be left holding the bag if an employee leaves before the advance is paid back. For that reason, this option is more appealing to companies with relatively stable workforces.

### LESS RISKY BUSINESS

HSAs and high-deductible health plans can be complicated, especially if employees never had to shoulder substantial risk before. Communication during open enrollment, and the first year HSAs and high-deductible health plans are available, is crucial to getting employees to

sign on. If this is the first time your company will be offering HSAs and high-deductible health plans, be ready to communicate the benefits (and detriments) early and often. Your communication efforts should span all media and hit these hot spots.

- Employees should be told about their out-of-pocket costs — deductibles and co-payments. *Tip:* Use real-life examples of specific medical situations, and provide employees with web-based cost calculators that allow them to model their anticipated medical expenses.

- HSAs should be sold as a long-term solution to employees' medical costs. Most employees regard HSAs as similar to flexible spending accounts, with a use-it-or-lose-it philosophy; employees don't understand that HSA balances can be carried over from year to year, are portable, and can be used to save for post-retirement expenses.

- Employees' choice of providers usually isn't impacted by HSAs and high-deductible health plans. Employees had similar qualms when HMOs hit the scene more than 20 years ago. It's important to stress that, as with HMOs, this usually isn't the case.

\* \* \* \* \*

### Supreme Court's 'Plan Documents Rule'... (cont.)

likely be limited to a lawsuit against the beneficiaries in state court. By ruling that the plan and insurer had no *duty* to investigate the circumstances under which the beneficiaries were changed, this trial court actually expanded the Supreme Court's decision, which basically stopped at consulting the plan documents.

What the trial court left

for another day, and perhaps another court, is the question of how far fiduciaries have to go if they know that there's been overreaching. How much knowledge would be enough? In the meantime, it seems safe to say that, regardless of the circumstances, plans cannot be held liable if distributions are made in accordance with plan documents. ♦

### HSA INFLATION ADJUSTMENTS FOR 2010 ANNOUNCED

The IRS has released the 2010 inflation-adjusted figures for HSAs and high-deductible health plans. *Reminder:* HSA amounts are expressed annually, but are figured on a monthly basis.

- **Employees with self-only coverage** under high-deductible health plans can contribute up to \$3,050 into their

## Your 401(k) Plan Continues To Tank. Here's What To Do Now

There are five stages of grief, and it's a safe bet that employees, whose 401(k) balances have been in steady decline for the last year or so, have transcended the second stage, which is anger, and have landed in the fourth, which is depression. Suing someone for those losses, namely fiduciaries, may hasten their transition into the fifth stage, which is acceptance. Will they have a suit? They may, if you haven't complied with ERISA.

### A GOOD OFFENSE IS THE BEST DEFENSE

The ongoing volatility in the stock market should remind fiduciaries that they aren't impervious to lawsuits. Now is a good time to review ERISA's liability rules: Section 404(c) does allow fiduciaries to limit their liability to plan participants for the investment choices they make, but not their liability for the investment options available under the plan, or for selecting and monitoring outside service providers. Fiduciaries must always act prudently and in the sole interest of plan par-

ticipants. Acting prudently, in this context, may mean taking these extra steps.

- Check with your outside investment advisor on the plan's investment options. Instead of quarterly reports, request weekly, biweekly, or monthly updates.

- Assess whether the plan's investment options still make sense in light of recent market swings, paying particular attention to investment risks, and stick to any written guidelines you have. You might want to add a conservative investment option. *Warning:* Avoid rash judgments regarding proposed changes; 401(k) plans are long-term retirement investment vehicles that shouldn't be changed solely in response to relatively short-term market volatility. Also, beware of vendors who benchmark to their own funds.

- Disclose fees to employees. Many fiduciaries have run into a buzz saw of litigation over fees.

- Check with third-party administrators (e.g., record-keepers) regarding their financial

status. Record-keepers who run into financial trouble won't impact employees' investments, but they may inconvenience those who want to change investment options or withdraw money.

- Communicate often with employees. You should extend these communication efforts to remind employees about the benefits of diversification, rebalancing, the long-term nature of their 401(k) investments, and the investment tools that are available to them. Good communication is especially important if the company will be suspending its employer match.

- Document your efforts.

### QUALIFIED DEFAULT INVESTMENT ALTERNATIVES

Of course, plans that use certain qualified default investment alternatives (QDIAs) should take all of the above steps. But since these plans rely on target-date funds and stable-value funds, they should do a little bit more.

- Some target-date funds have performed worse than others. When evaluating the performance of these funds, it's crucial to determine whether the decline is in line with expectations relative to the fund's projected returns.

- Stable-value funds are wrapped in an insurance product, which is what makes stable-value funds stable. You should evaluate the type of insurance wrapper and the underlying investments, which may not have performed well. Under final regulations, auto-enrolled 401(k) plans can place employees in stable-value funds for the first 120 days. In addition, these funds are grandfathered in as a QDIA option. ❖

\* \* \* \* \*

### HSAs Aren't A Tough Sell, If You Do It Right... (cont.)

HSAs. The minimum annual deductible for a high-deductible health plan is \$1,200. The annual maximum amount of out-of-pocket expenses (deductibles, co-payments, etc.) is \$5,950.

- **Employees with family coverage** under high-deduct-

ible health plans can contribute up to \$6,150 into their HSAs. The minimum annual deductible for a high-deductible health plan is \$2,400. The annual maximum amount of out-of-pocket expenses (deductibles, co-payments, etc.) is \$11,900. ❖

## EEOC Throws Monkey Wrench Into Health Screening Programs

In an informal letter to an inquiring employer, the Equal Employment Opportunity Commission (EEOC) has concluded that requiring all employees to take a health risk assessment that includes disability-related inquiries and medical examinations as a prerequisite for obtaining health insurance most likely violates the Americans with Disabilities Act (ADA). *Note:* The EEOC acknowledged that the letter doesn't represent its official position on this subject.

### PREREQUISITE FOR HEALTH INSURANCE

Under the plan, in order to be eligible for health insurance, employees would have to participate in a clinical health risk assessment, which included answering short health-related questions, taking a blood pressure test, and providing blood for use in a blood panel

screen. Information from the health risk assessment would go directly and exclusively to employees; the employer would only receive information in the aggregate.

The EEOC concluded that the ADA was most likely violated because participation was mandatory. *EEOC:* Once employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity. Requiring all employees to take a health risk assessment that includes disability-related inquiries and medical examinations as a prerequisite to obtaining health insurance doesn't appear to be job-related, the EEOC stressed.

The EEOC also reviewed the circumstances under which employers may gather health-related information from em-

ployees. A disability-related inquiry or medical exam may be job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition, or that an employee will pose a direct threat due to a medical condition. Employers may also seek this information if it follows up on a request for a reasonable accommodation.

### NOT APPLICABLE TO WELLNESS PROGRAMS

The EEOC noted that disability-related inquiries and medical exams are permitted as part of a voluntary wellness program. Its definition of a voluntary program is a wellness program under which employees are neither required to participate nor penalized for non-participation. However, since this employer's testing program was mandatory, the EEOC's exception for voluntary wellness programs didn't apply. ❖