WINSTON & STRAWN LLP

BLOG

Maintaining Privilege When Responding to Claims for Benefits Under Employee Benefit Plans

JULY 29, 2020

ERISA applies to a wide range of employee benefit plans, including retirement plans, health plans, and severance plans. The broad application of the statute can create pitfalls for plan administrators, employees acting as fiduciaries, and counsel when investigating and responding to a claim for payments or other benefits under an ERISA-covered plan. In particular, the fiduciary exception to the attorney-client privilege can result in claimants and their counsel being able to discover otherwise-privileged communications between plan management and the company's counsel. This article discusses the history of the fiduciary exception, its application to ERISA claims, and best practices to maintain the privilege.

Attorney-Client Privilege and the Fiduciary Exception

Although in-house and outside counsel occasionally take the attorney-client privilege for granted, the privilege is far from sacrosanct and is a limited exception to the presumption of broad discovery in litigation. Generally, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . ." Fed. R. Civ. P. 26. There are, however, exceptions to this presumption of disclosure. In particular, the attorney-client privilege protects from disclosure communications that were 1) made in confidence, 2) between a client and the client's attorney, and 3) for the purpose of obtaining legal advice.

Courts usually uphold the attorney-client privilege, but it is narrowly construed, and there are significant exceptions to its application. In particular, courts have consistently recognized the fiduciary duty exception to the privilege. The exception has its roots in English common law. "The rule was that when a trustee obtained legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 170 (2011). "The courts reasoned that the normal attorney-client privilege did not apply in this situation because the legal advice was sought for the beneficiaries' benefit and was obtained at the beneficiaries' expense by using trust funds to pay the attorney's fees." *Id*.

In U.S. courts, the exception was first recognized in the context of shareholder derivative suits. There are various, sometimes inconsistent, theories underlying the exception. First, the theory most commonly cited by courts is that a trustee has a general duty of full disclosure that extends to all material facts affecting beneficiaries' rights and that

the attorney-client privilege does not limit this duty. Second, courts frequently cite a mutuality of interests between the fiduciary and the beneficiary, such that application of the privilege would be inappropriate. Third, when administering a trust, courts identify the beneficiaries as the true client of any legal advice obtained by the fiduciary.

The Fiduciary Duty Exception and ERISA

In more recent years, the judiciary has found that the principles underlying the fiduciary duty exception support its application to claims for benefits by participants in ERISA-covered plans. The reasoning rests on the history and purpose of the statute. ERISA was created following an increasing number of employer-funded pension plans failing to provide the anticipated benefits to employees. In particular, ERISA's passage by Congress in 1974 followed in the wake of the Studebaker bankruptcy, in which thousands of Studebaker employees lost their pension benefits. At the outset of the act, Congress noted, "despite the enormous growth in [benefit] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans[,] . . . the inadequacy of current minimum standards[, and] . . . the termination of plans before requisite funds have been accumulated . . . . [I]t is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness."

As applied to ERISA claims, the fiduciary exception arises when a plaintiff seeks to compel production of communications between counsel and employees of a plan administrator regarding matters of plan administration. These are usually communications made during the course of reaching a decision on a claim for benefits. For example, courts have ordered production of communications between HR leadership and counsel regarding the settlement value of severance benefits, entitlement of a claimant to severance benefits, messages regarding the scope of indemnification provided to fiduciaries, and revisions to summary plan descriptions.

To avoid application of the exception in ERISA litigation, a plan administrator will typically argue that the rationale underlying the exception does not support its application to the communication at issue. For example, courts have ruled that the exception does apply where plan administrators are fulfilling "settlor" functions, such as where an employer adopts, modifies, or terminates an ERISA plan. Such functions are outside the scope of the exception because settlor functions can be made in the best interest of the plan sponsor. These functions are not fiduciary in nature and, thus, legal advice related to settlor functions is not sought for the plan participants' benefit. Also, where the interests of a fiduciary and the beneficiaries have sufficiently diverged, courts frequently will not apply the exception because there is no longer a mutuality of interests. This usually occurs when litigation has become reasonably anticipated. Advice concerning the personal liability of a fiduciary is also not subject to the exception. Still, this leaves open to discovery many communications between attorneys and employees of plan administrators and fiduciaries in the course of reaching a benefits determination.

Best Practices for Responding to Claims and Maintaining Privilege

Perhaps the most important defense to an unintentional waiver of the attorney-client privilege is being cognizant of when ERISA and the fiduciary-duty exception may apply. ERISA covers a wide range of employee benefit plans, and a plan may be subject to ERISA regardless of whether an employer intended this to be the case. For example, where an employer routinely provides severance payments to employees, such practice may be found to constitute an ERISA-covered severance plan, implicating application of the fiduciary-duty exception. Where an employer maintains an ongoing practice of regularly providing benefits to employees, the employer should contact its counsel to confirm whether those practices are subject to ERISA. Likewise, employers should consult counsel anytime they receive a claim for benefits from an attorney on behalf of an employee.

Employers should maintain an ongoing distinction between communications related to fiduciary tasks versus communications not related to fiduciary duties. An attorney assisting fiduciaries with a benefits determination should keep any communications related to that determination separate from communications related to other matters. The more intermingled communications become regarding matters subject to the fiduciary exception and those outside

its scope, the less likely a court will be able to effectively distinguish between the two. Likewise, clearly designating when litigation is reasonably anticipated and work-product protection attaches will further guard against an unknowing application of the exception.

Conducting fiduciary training in advance with model determination letters will reduce the need for routine communications with counsel regarding claims procedures and reduce the need for counsel to draft benefits determinations. Still, many benefits determinations will inevitably involve outside counsel in the preparation of a written adverse determination. Such a letter should clearly state that the determination is that of the plan administrator. Counsel should neither make the decision for the plan administrator nor strongly suggest a desired outcome. To the extent that fiduciaries and counsel need to share versions of the draft letter or otherwise discuss the determination, verbally communicating edits and comments will minimize the likelihood that such information will be produced in subsequent litigation.

Fiduciaries should also guard against carelessly worded messages. During the benefits determination and in connection with any subsequent lawsuit, the plan administrator will almost certainly be required to produce any document that was considered or created by the administrator's employees in the course of reaching the benefits determination.

Please contact your Winston & Strawn relationship attorney or the authors for more information.

5 Min Read

Authors

Erin Haldorson Weber

Scott Landau

Related Locations

Chicago

New York

Related Topics

ERISA

Related Capabilities

Labor & Employment

ERISA Litigation

Related Regions

North America

Related Professionals

Erin Haldorson Weber

Scott Landau

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.