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BLOG

Employee Releases Barring ERISA Claims

JULY 29, 2019

Employees are customarily required to execute a broad release in connection with receiving severance pay and other negotiated separation agreements. However, the effectiveness of such release with respect to ERISA claims is unsettled. A recent Federal district court decision makes this an opportune time to assess employee releases of ERISA claims.

Background on Releases. Standard release language tends to be so lengthy that employers assume that it covers ERISA claims. Despite the broad language, plaintiffs frequently challenge the application of the release to ERISA disputes asserting that (i) ERISA precludes the waiver of vested benefits, (ii) ERISA precludes the waiver of fiduciary breach claims, or (iii) an individual may not release claims brought on behalf of a plan.

As an initial matter, releases are enforceable only if, based upon the totality of the circumstances, executed by the plaintiff knowingly and voluntarily. Courts tend to assess the following factors when considering whether the release was knowing and voluntary: the plaintiff's education and business experience, the plaintiff's input on the terms of the release, the agreement's clarity, the amount of time the plaintiff had to consider the release, whether the plaintiff knew his or her rights before signing the release, whether the plaintiff received independent advice, and the nature and amount of consideration the plaintiff received in exchange for the release. A release can be enforceable even if not all factors weigh in the employer's favor. Courts apply heightened scrutiny when considering ERISA claims; given ERISA's duties of loyalty and prudence in favor of the plan participant, courts tend to judge the factors tightly.

Prior guidance on releases of ERISA claims. The Supreme Court has ruled that a participant's knowing and voluntary waiver of ERISA benefits does not violate ERISA's anti-alienation provision. (*Kennedy v. Plan Administrator for DuPont Savings and Investment Plan* (2009)). This decision has generally been used to affirm the right of a participant to prospectively waive participation in a plan and of a spouse to waive beneficiary rights. The more difficult question courts face is whether a release may be asserted to block ERISA fiduciary claims. ERISA requires breach of fiduciary duty actions to be brought as claims for losses to the ERISA plan itself because ERISA imposes liability on fiduciaries for losses to the plan, not losses to individual participants or beneficiaries. *See* 29 U.S.C. 1132(a)(2). Although to have standing to sue the plaintiff must demonstrate that he or she suffered a loss to bring the fiduciary claim on behalf of the plan, the plan is the true plaintiff and any recovery must flow through the plan before payment to participants.

While plaintiffs often argue that a plan participant cannot waive ERISA fiduciary claims because the fiduciary claims are the plan's, not the participant's, courts have ruled otherwise. In *Howell v. Motorola, Inc.* (2011), the Seventh Circuit dismissed a plaintiff's fiduciary claim in a "stock drop" case because the plaintiff knowingly and voluntarily executed a release in exchange for enhanced severance pay. Despite the *Howell* case, most courts have found that an individual release does not block a participant's fiduciary claims on behalf of the plan in a class action. A class may be certified even if a participant may be excluded from the class because of a valid release, although in such a situation, the plaintiff may not be an appropriate representative of the participant class.

Most recent opinion. The most recent case, *Innis v. Bankers Trust Co. of South Dakota,* demonstrates how important the facts of the case are to the ultimate decision regarding the release. The Southern District of Iowa dismissed the plaintiff's claim after finding that the facts indicated that the plaintiff's release covered ERISA claims against the plan's trustee and was entered knowingly and voluntarily, at the same time the plaintiff had not taken any action to bring the fiduciary case on behalf of the plan as a whole.

The plaintiff, Innis, worked at Telligen, Inc. for 18 years, and when her employment terminated in 2014, she signed a severance agreement and broad release, in exchange for severance pay and job-transition services. Then, in 2016, Innis filed the case, alleging that Bankers Trust, as trustee of the Telligen, Inc. Employee Stock Ownership Plan (ESOP), breached its fiduciary duties when it authorized the ESOP to purchase Telligen, Inc. stock.

The court first determined that Innis entered into the severance agreement knowingly and voluntarily. The court analyzed Innis's education and work experience, the breadth and clarity of the release's language, amount of time Innis had to consider before signing and revoke after signing (45 days and 7 days, respectively), her awareness of the ESOP transaction and that Bankers Trust was involved when she signed the release, the release's language stating that she discussed it with a lawyer and that she received $16,580.76 plus career services in exchange for the release. Based upon the totality of these facts, the court concluded that she signed the release knowingly and voluntarily.

The court also concluded that the release was broad enough to include ERISA claims against Bankers Trust for losses to the ESOP. The release did not specifically mention ERISA claims, but the court reasoned that since the language referred to claims under federal law, of any nature, arising from the employment relationship, that ERISA claims were covered. In addition, the court determined that Bankers Trust was a third-party beneficiary of the release. The release stated that it covered Telligen, Inc. and its owners, members, stockholders, affiliates and all persons acting on behalf of or in concert with any of them. Bankers Trust was released because it acted on behalf of the ESOP as a stockholder of Telligen, Inc.

Although the court determined that Innis released her own ERISA fiduciary claims against Bankers Trust, it still had to determine whether the case could go forward on behalf of the ESOP. The court considered that Innis had not taken any steps to act as a representative of the ESOP, such as obtain class certification, had not satisfied other procedural requirements to represent the ESOP, and had not recruited any other plaintiffs. As a consequence, the court dismissed the case because, as the only plaintiff, Innis' claim had been released.

What to do now? Employers who desire to maximize the chances that an employee's release will be upheld should carefully word the release to specifically include ERISA claims brought individually and on behalf of the plan and specifically define the released parties to include trustees, fiduciaries and others affiliated of the plans. In addition, employers should act judiciously to ensure that the release is determined to be knowing and voluntarily, including providing proper consideration and encouraging employees to seek counsel and understand their right to revoke their signature.

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