205 North Tenth Street, Suite 300 · Boise, Idaho 83702
208.342.5522 · 1.866.ERISALAW
www.erisalawgroup.com

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Reminder of June 30 Amendment Deadline for Cafeteria Plans

Most cafeteria plans (also known as Section 125 or flexible benefits plans) have permitted reimbursement of over-the-counter drugs and medicines without a prescription. Under health care reform (and as discussed in our September 2010 *ERISA Alert*), expenses incurred for medicine or drugs may only be treated as reimbursable medical expenses if they are actually prescribed (without regard to whether the drug or medicine would normally be available without a prescription). There is an exception for insulin.

The change in law is effective January 1, 2011. IRS rules require that cafeteria plan changes be adopted in writing before the change becomes effective. However, for this specific change, the Treasury Department has given employers until June 30, 2011 to adopt the amendment retroactive to January 1, 2011.

The following should also be noted:

The IRS may well be examining health care reform amendments to cafeteria plans

- Summary plan descriptions must be modified and provided to participants.
- Health care expenses that are not drugs or medicine may still be reimbursed without a prescription.
- If you have not yet adopted cafeteria plan amendments for other health care reform and HIPAA changes affecting such plans, and even if the deadline has passed, please contact us if you desire our assistance. One such example is the required amendment to cafeteria plans (*not* just the amendment to medical plans) to allow for reimbursement for children who have not yet attained age 27.
- Additional rules apply if debit cards are used for the plan.

Supreme Court Signals Broadening of Remedies Against Employers Under ERISA and also Departure from Rule Regarding Plan Document v. SPD Conflict

The U.S. Supreme Court recently issued a ruling in an ERISA case that provides employers with several key take home points and reminders:

- Employers must identify and recognize their fiduciary duties and status.
- Employers must take the appropriate actions (and document them) to avoid allegations of breach of their duties and responsibilities.
- Careful attention to detail relative to plan changes is critical.
- Careful attention to detail in communications to participants is critical (including but not limited to summary plan descriptions ("SPD")).
- The remedies available to plan participant plaintiffs may be broadening. More types of recovery may be available which very well may enable participants to recover monetary damages in litigation against employers.

<u>New Theories of Recovery Under ERISA</u>?

The remedies available to aggrieved participants under ERISA are specified and limited. Historically, the courts have narrowly construed the breadth of those remedies. Such narrow construction has favored plan sponsors. In general and most notably, participants are unable to recover "compensatory damages" and cannot proceed under state law theories of recovery, for example, under garden variety negligence. Instead, ERISA generally allows participants to seek to recover:

1. *Benefits* to which they are entitled under a plan;
2. *Losses to the plan* resulting from fiduciary breaches; and
3. "Other appropriate *equitable relief*."

This last category of equitable relief has been the subject of judicial interpretation for decades. In a departure from prior holdings, the Supreme Court took the opportunity to broadly construe the equitable relief provision.

The case is *CIGNA Corp. v. Amara*. The facts of the case are complicated. They generally involved the amendment of a defined benefit plan into a cash balance plan and communications to participants regarding the plan's changes. The employer and employees disagreed as to the benefits to which the participants were entitled following the amendment.

The lower federal court (the District Court) ordered the plan terms to be changed so that the participants received what the court believed they had coming to them. The District Court relied upon the theory of recovery described in No. 1 above (recovery of benefits). The Supreme Court disagreed and held that No. 1 above did not permit the District Court to issue such an order because the order did not direct the recovery of benefits provided by the terms of the plan, but instead ordered the terms of the plan to be changed. Notwithstanding, the Supreme Court went on to indicate that recovery under No. 3 (equitable relief) may permit an order that would change the terms of the plan.

The Supreme Court went on to discuss three traditional "equitable" remedies that possibly might apply to the facts of this case: reformation, estoppel, and surcharge. The Supreme Court stated that this last category, surcharge, generally allows "relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty … to prevent the trustee's unjust enrichment." The trustee contemplated by the Court in this analysis was not an ERISA plan trustee *per se*, but rather was a traditional trustee analogous to an employer or other fiduciary for the plan.

Without getting into a detailed discussion of "legal" versus "equitable" remedies (a quagmire of untold proportions as is evident from the Supreme Court opinion and opinions that preceded it), the concept of monetary compensation is typically associated with a "legal" remedy, not an equitable remedy, and has not been available under ERISA because it does not fall within one of the three categories enumerated above. Historically, ERISA claimants could not recover money as a substitute for the damages they have suffered; rather, they were limited to recovering benefits or having a court order another party to take action.

As a result, the Supreme Court's identification of a monetary recovery as potentially constituting an "appropriate equitable" remedy is a significant development that is not favorable to employers (and is favorable to plaintiffs' attorneys). The Supreme Court did not actually hold that surcharge (*i.e.*, monetary compensation here) was in fact available in this particular case, but rather it returned the issue to the District Court for consideration.

<u>Status of Summary Plan Description Versus Plan Documents</u>?

The Supreme Court also discussed whether the terms of the SPD should have been enforced *as if* they were the plan terms.

This issue arose in the context of the Supreme Court's consideration of filings by the U.S. Department of Labor ("DOL"). The DOL offered an alternative rationale for the District Court's reliance on No. 1 above (that is, enforcing a claim for benefits). The rationale was that the terms of the SPD (which were consistent with the terms the participants contended were accurate) were, or should be construed as, the terms of the plan, thus vitiating the need for the court to rewrite the plan (and then order compliance therewith).

Employers that fail to approach the drafting of plan language <u>and</u> employee communications with great attention to legal detail face an uphill battle in disputes with employees

Substantial case law in the past ten years or so generally stands for the proposition (with some variations) that when there is a conflict between the SPD and the plan, the provision that is more favorable to participants will prevail (whether such more favorable provision is in the plan or the SPD). Notwithstanding this precedent, the Supreme Court refused to substitute the terms of the SPD for the terms of the plan, thus calling into question the status of this developing rule.

The Supreme Court's rationale makes sense. Generally, the Supreme Court stated that SPDs are *summaries* whereas plans contain the details. To substitute summaries for the plan "might bring about complexity that would defeat the fundamental purpose of the summaries."

The developing law that the document most beneficial to participants will dictate the outcome obviously primarily aids participants. Accordingly, the Supreme Court's statements may serve to provide greater protections to employers that in most instances would prefer to rely on the more detailed plan language.

Conclusion

The practical impact of this ruling is unknown, except to say that in the future many courts will grapple with the issues and questions the decision raises. In the meantime, employers and other fiduciaries heeding the take home points outlined above will best position themselves to avoid being parties to those disputes.

For additional information or if you have questions,
contact Jeffery Mandell or John Hughes at 208-342-5522 or 1-866-ERISALAW.

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