

The Billion Dollar 'Readable' Plan

11/8/2010

[Heidi A. Lyon](#)

Why can't the plan document be more "readable"? This is the question clients and service providers often ask us when expressing their distaste for the technical jargon and formatting we use in benefit plan documents.

Contrary to what it may seem, there is no conspiracy by ERISA attorneys to prevent anyone else from interpreting what benefit plans say. We actually do want clients to understand their plans.

And, we'll often respond that we put this language in plan documents because the IRS requires it or because it provides important protections to clients. However, a recent participant lawsuit against Verizon offers an example of another, and an arguably more compelling, answer: accuracy.

When the retirement plan document for a company that Verizon would later acquire was amended and restated, a drafting error increased the amount of benefits being promised under the terms of the plan document by about \$1.67 billion. The error was not repeated in any other communication or benefit statement and the affected plan participants did not rely on the erroneous language in determining their benefits.

But, a plan participant noticed the drafting error and filed a claim requesting the calculation of her benefits under the erroneous terms of the plan document. Her claim and appeal were denied, citing the drafting error, and she sued Verizon (the plan administrator) on behalf of all affected plan participants to enforce the plan document's written terms.

The lower court that heard the case held that the plan abused its discretion in ignoring the drafting error because federal law requires plans to be enforced exactly as written. However, it also noted Verizon could request permission to reform the plan document to eliminate the erroneous language if Verizon could prove there had been an error and that reformation would produce a fair and equitable result. Verizon filed a claim for reformation and the court found in its favor, so it will not be forced to pay an extra \$1.67 billion in unintended benefits. This decision was recently affirmed on appeal.

What's significant about this case, aside from the shocking amount of money at stake, is how the error occurred in the first place. It was the result of the plan administrator's in-house counsel revising a draft of the plan document in an attempt to make it easier to read. The drafting error involved just a few words and wasn't reviewed by outside counsel. It was only noticed when the participant filed a claim for benefits based on the erroneous language.

The participant argued that it was "profound negligence" to entrust a single in-house attorney with revising a critical provision in a multibillion dollar retirement plan without review by another expert. The court responded, "It is baffling that a major corporation would not invest greater resources to ensure accuracy in the drafting of such an important document."

The court further observed that if any participants had relied on the drafting error or the company had not been able to provide such overwhelming documentary evidence of its intent, Verizon could have lost the case. Even with these facts, the result could have been different in another court because the case law on reforming a plan document to correct an error varies in other jurisdictions.

While Verizon was fortunate to escape a catastrophic outcome in this case, it only did so after years of litigation (which was likely very costly) and risk to the tax qualification of its plan. Regardless of what occurs in litigation like this, the IRS can penalize a plan for failing to follow its written terms. The IRS has refused to approve the defense that a plan document shouldn't be interpreted as written where the written terms are the result of a drafting error, and it has shown it will penalize plans even if a minor drafting error is the cause of such a failure.

Although we are constantly evaluating how to improve our plan documents and make them easier to understand, the Verizon case offers a billion examples why we prioritize accuracy over readability when we draft plan documents. And, in the end, an easy-to-read description of the benefits a plan provides is the purpose of another document – the summary plan description.

Please feel free to contact a Warner Norcross & Judd LLP Employee Benefits attorney with any questions you may have about your plan documents or for more information on what you can do to ensure they are in order.