

## No Special Treatment For "Top Hat" ERISA Plans In The Ninth Circuit

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In [\*Sznewajs v. U.S. Bancorp Amended and Restated Supplemental Benefits Plan\*](#), \_\_\_ F.3d \_\_\_, 2009 WL 2004452 (9th Cir. July 13, 2009), the Ninth Circuit Court of Appeals addressed, for the first time, whether the standard of review analysis for “top hat” ERISA plans is the same as for other ERISA plans.

Franciene Sznewajs, the ex-wife of co-defendant Robert Sznewajs, challenged the Plan’s decision to treat Robert Sznewajs’ second wife, Virginia Sznewajs, as his surviving beneficiary. The Plan Administrator denied Franciene’s claim for benefits because it interpreted Robert’s “retirement” to have occurred when Robert started collecting benefits. Franciene argued that “retirement” meant the date of Robert’s termination of employment. The issues on appeal were the appropriate standard of review and the definition of retirement under the Plan.

The employee benefit plan in this case is known as a “top hat” plan. ERISA “defines a top hat plan as one which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.” Sznewajs at \*4. Because of the specialized nature of “top hat” plans, Congress exempts such plans from certain ERISA regulations. [\*Gilliam v. Nevada Power Co.\*](#), 488 F.3d 1189, 1192-93 (9th Cir. 2007).

In most ERISA cases, the administrator’s claim decision is reviewed under the de novo standard of review unless the plan documents grant the administrator discretionary authority. Here, Franciene argued that, despite the discretion granted to the plan administrator, the district court should utilize the de novo standard of review because payments made to beneficiaries come directly from the company’s pockets and those payment decisions are made by the company’s executive committee. Franciene’s argument was consistent with holdings in the Third and Eighth Circuits, both of which have ruled that “top hat” plans are subject to a de novo standard of review despite the existence of a grant of discretionary authority for the very same reasons. However, the Ninth Circuit disagreed, explaining that applying a de novo standard of review to “top hat” plans “would create unnecessary confusion.” Therefore, in the Ninth Circuit, “top hat” plans are subject to the same standard of review analysis as other ERISA plans.

Finally, in making this ruling, the court found that the Plan did not abuse its discretion in its interpretation of the term “retirement.”