



Benefits Alert

Legal developments affecting employee benefits

A publication of Nixon Peabody LLP

September 10, 2009

Retirees prevail in claim for vested health benefits notwithstanding reservation of rights provision in summary plan description

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Unisys Corporation has been embroiled in litigation concerning its right to change its retiree health benefits since the 1990s. The Third Circuit just issued its most recent decision, *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 3d Cir., No. 07-3369, 9/2/09, joining at least three other Third Circuit decisions emanating from this litigation. In this case, a group of retirees prevailed in their claim that their retiree benefits were vested and could not be changed, notwithstanding a reservation of rights provision in the summary plan description. The latest decision includes some important reminders and cautions to plan administrators on how careful you need to be when communicating retiree benefits.

In previous decisions, the Third Circuit held that Unisys retirees could not prevail on a claim for benefits under the plan or an estoppel theory because of the express reservation of rights clause in the retiree medical summary plan descriptions that notified participants of Unisys' right to change or terminate retiree medical benefits. However, the Third Circuit also held that the retirees could proceed on a breach of fiduciary duty theory. The Third Circuit's most recent decision addresses an appeal of a district court's decision that twelve plaintiffs had proven the elements for a breach of fiduciary duty claim, and consequently were entitled to prospective lifetime benefits based on the terms of their retiree health care coverage when they retired. In a decision that could pose problems for companies that reduce or terminate retiree health care benefits, the Third Circuit upheld the district court's ruling.

This litigation has a long and complicated history. The following is a brief summary of the most pertinent facts that are important to understanding the court's decision. In 1986, two competing manufacturers, Sperry and Burroughs, merged to form Unisys. After the merger, Unisys created a new retiree medical plan, but told employees who were eligible to retiree that they could participate in the existing plans if they retired before April 1, 1989. Each of the plaintiffs retired from Unisys before that date. In 1992, Unisys announced that it was terminating the current plans and replacing them with a new plan. Under the new plan, retirees became responsible for an increasing amount of the cost of retiree medical coverage until 1996 when they became responsible for the full cost of the coverage.

The summary plan descriptions for the plaintiffs' retiree medical plan included reservation of rights

clauses that granted Unisys the authority to amend or terminate the plan. However, in various counseling sessions Unisys human resource staff members made specific statements to the plaintiffs about the duration and costs of those benefits, without suggesting that these benefits could be reduced or eliminated in the future. Moreover, the district court found that Unisys knew its employees were confused about Unisys' right to change or terminate retiree medical benefits and that this confusion would benefit the company financially.

The Third Circuit began its analysis by citing the elements that a plaintiff must prove to prevail on a breach of fiduciary duty claim. Specifically, in the Third Circuit a breach of fiduciary duty claim may be premised on a misrepresentation or an omission if the plaintiff can demonstrate that (1) the defendant was "acting in a fiduciary capacity"; (2) the defendant made "affirmative misrepresentations or failed to adequately inform plan participants and beneficiaries"; (3) the misrepresentation or inadequate disclosure was material; and (4) the plaintiff detrimentally relied on the misrepresentation or inadequate disclosure.

The plaintiffs' theory was premised on the argument that in various retirement meetings Unisys human resource staff members misrepresented that the plaintiffs' retiree medical benefits would continue for their lifetimes at specified costs. Moreover, by making such statements and failing to adequately advise the plaintiffs that Unisys reserved the right to change or terminate the benefits in the future, Unisys breached its fiduciary duty. The Third Circuit rejected Unisys' arguments that oral statements about retiree health benefits did not constitute affirmative misrepresentations that were actionable when the summary plan description included an unambiguous reservation of rights clause that reserved Unisys' right to amend or terminate benefits. Specifically, the court stated "Unisys' arguments that it disclosed its reservation of rights in the summary plan descriptions and other documentation is unavailing because Unisys did not present this information when it was counseling its employees on their retirement decisions."

The Third Circuit made a number of important conclusions when reaching its decision. First, the court concluded that Unisys' human resource staff members were acting in a fiduciary capacity when they discussed the retiree health benefits with the plaintiffs. Second, and most troubling, the court concluded that human resource staff members' failure to disclose Unisys' right to modify or wholly eliminate the plaintiffs' medical benefits at any point in the future resulted in an inadequate disclosure of information. In other words, even though the human resource staff members' representations were accurate statements about the duration and costs of retiree medical benefits at the time the statements were made, the staff members should have said more. Specifically, they should have mentioned that Unisys reserved the right to change benefits in the future, even though there was no current plan to change the benefits. Third, the court concluded that a reasonable fiduciary would have foreseen that its conduct would result in the plaintiffs making an important decision based on the mistaken belief that they possessed guaranteed lifetime benefits. Finally, the court recognized that to prevail on their claims, each plaintiff had to prove detrimental reliance. Accordingly, one of the plaintiffs who terminated employment as part of a settlement of the plaintiff's lawsuit and a second plaintiff who was involuntarily terminated could not prevail on their claims because they could not prove detrimental reliance.

While other circuits have acknowledged that human resource staff members act in a fiduciary capacity when explaining to participants how their benefits work, other circuits would not, except for egregious circumstances, find a breach of fiduciary duty if there is a miscommunication that is clarified by the unambiguous terms of a summary plan description. In fact, the inherent shortcoming

of oral communications is one of the underlying reasons that ERISA requires written summary plan descriptions to be provided to all plan participants. How future courts will interpret the Third Circuit decision is unclear. There were facts in *Unisys* that were particularly sympathetic to the plaintiffs. For example, the district court found that Unisys understood that employees did not fully understand the scope of its reserved powers and did nothing to clarify this point.

Plaintiff attorneys will surely argue that this case stands for the proposition that retirees may sue employers for oral or written statements about the duration and cost of retiree health care benefits if employees are not expressly told that their employers reserve the right to change or terminate the benefits in the future. Such attorneys will also argue that such omissions are actionable even in the face of a summary plan description that has a clear reservation of rights clause.

The case was not all bad news to Unisys. ERISA only provides equitable relief for breaches of fiduciary duty. Accordingly, while the court ruled that Unisys breached its fiduciary duty, the court granted the plaintiffs prospective relief in the form of reinstating the retiree benefit plan for the plaintiffs under the terms as it existed on the date of their retirement as a vested benefit. The court denied plaintiffs' claims for monetary and other damages because such remedies did not constitute equitable relief. In other words, the plaintiffs did not obtain retroactive relief for past losses they incurred for the period that their coverage was curtailed.

Here are a few important points and lessons to take from this case and similar cases premised on a breach of fiduciary emanating from an alleged misrepresentation:

- In many instances it will be difficult for employees to bring these actions as class actions because a plaintiff's claims will be based on alleged misrepresentations made to that particular plaintiff. Additionally, each plaintiff will have to prove all of the breach of fiduciary elements set forth above, which involve individual-specific facts. For example, in this case only twelve out of the thousands of retirees successfully brought claims.
- However, in many instances it will be difficult for employers to resolve these cases on summary judgment because the court will have to make factual determinations as to what was said. Also, disagreements will arise as to who said what. Accordingly, these cases will be expensive to litigate.
- These cases will present challenging evidentiary issues because they will involve past conversations, and people may have differing recollections of what was said. One troubling fact in this case is that some of the plaintiffs who prevailed could not remember the name of the human resources personnel who counseled them on their retiree benefits. It is not clear how an employer can rebut a retiree's claim under such circumstances.
- The location of a retiree medical lawsuit can be an important factor in its outcome. Some of the Federal Circuit Courts of Appeals appear to be more receptive to these breach of fiduciary duty claims than others. Based on the *Unisys* decision, courts in the Third Circuit have become an unfavorable venue for employers to litigate retiree medical cases.
- Employers should make sure that all documents, presentations, and counseling sessions mention the fact that the employer reserves the right to change or terminate retiree benefits in the future.

- Employers should limit those individuals who are authorized to communicate to employees about retiree benefits and make sure that such individuals receive appropriate training on what they should and should not say. Written materials should also be distributed at retiree presentations and counseling sessions that include clear reservation of rights provisions. Employers should also consider obtaining a signed acknowledgement of receipt of the materials.

In sum, the *Unisys* case is an unwelcome and potentially dangerous precedent for employers. It is difficult to police every statement that human resource staff members make to employees about their retiree benefits. Moreover, employees do not always accurately remember everything that human resource staff members tell them. If courts broadly construe the *Unisys* decision and other circuits adopt its rationale, the opportunity for retirees to successfully challenge cuts in their medical benefits will significantly increase.

If you would like more information about the topics covered in this alert, please contact your regular Nixon Peabody attorney or:

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