# Court Says Welfare Plan Fiduciary Breached Duties by Misusing Participant Contributions

A federal district court in the Western District of Virginia has held, in Hammer v. Johnson Senior Ctr., that the fiduciary for a welfare plan violated its duties of loyalty, care and prudence by misusing a health plan participant's premium payments to pay operating expenses of the employer.

## Law

According to the DOL, a welfare plan fiduciary's primary responsibility is to operate the plan solely in the interest of participants and beneficiaries, and for the exclusive purpose of providing benefits and paying expenses. A company or individual can become a "functional" fiduciary under ERISA if it: (i) exercises discretionary control respecting the management of the plan or exercises any authority with respect to its the management and disposition of its assets; or (ii) has any discretionary authority or responsibility in the administration of the plan.

Amounts contributed by employees for health coverage under an ERISA welfare plan are deemed plan assets subject to ERISA's fiduciary rules. When an employer takes custody of plan participants' contributions, additional compliance obligations apply and special considerations must be observed in handling the funds.

ERISA generally requires that all plan assets be held in trust unless an exemption applies. In general, DOL regulations require employers to deposit employee contributions for a welfare plan in a trust or pay them to an insurer within a maximum of 90 days after the employer receives the employee contributions or 90 days from the date on which the contributions would otherwise have been payable to the participant.

DOL has stated, however, this 90-day deadline is not a safe harbor. Rather, employers must deposit employee contributions "on the earliest date on which they can reasonably be segregated from the employer's general assets.

## Facts

The plaintiff was a participant in the employer's health plan, and she contributed her portion of the premium for medical insurance coverage from the plan through her paycheck.

The plaintiff was diagnosed with lung cancer and took a medical leave to begin treatment. At around this same time, the employer began experiencing financial difficulties and it failed to pay the insurance premiums for the plan's medical coverage. Amounts that were withheld from employees' paychecks to pay for their portion of the medical insurance premiums were not separated from other funds in the employer's general operating account, and it appeared that the employer had used the funds to pay expenses.

As a result of this failure, the plaintiff's health insurance coverage under the plan lapsed. Despite the insurer's offer, the employer did not cure this lapse in coverage, which resulted in the plaintiff incurring $286,000 in unpaid medical expenses. The plaintiff responded by suing the employer in federal court, alleging that it breached ERISA's fiduciary duties of loyalty, care and prudence and violated COBRA's requirements.

## District Court

At trial, the court determined that while the plan document did not expressly name the owner/employer as a plan fiduciary, he had discretionary control over the bank account into which plan participants' premium contributions were deposited. In particular, the court found that at the time of the lapse in coverage, the owner was the only one with authority over this bank account, and that he was responsible for making sure the plaintiff's medical insurance premiums were paid. Therefore, the court concluded that the owner exercised discretionary control with respect to the health plan's administration, management and assets.

The court further determined that the evidence suggested the owner/employer had used the contributions withheld from the plaintiff's compensation to pay corporate operating expenses instead of the medical insurance premiums. The court further found the owner/employer's use of plan assets (i.e., the participant's contribution) in this regard was a breach of fiduciary duty. However, the court dismissed the plaintiff's COBRA claim because it concluded that her loss of medical insurance coverage resulted from the owner/employer's failure to pay premiums, which is not a COBRA qualifying event.

## Employer Takeaway

The failure to use plan assets for the exclusive benefit of participants and beneficiaries is a common compliance problem which can result in a breach of ERISA fiduciary duties. Welfare plan fiduciaries should ensure that participant contributions are used for the exclusive purpose of providing benefits and paying permissible plan expenses. A failure to do so makes the fiduciary personally liable for the damages that may result from such breaches of fiduciary duty.

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