

Analysis & Perspective

The U.S. Supreme Court's recent landmark decisions in *Metropolitan Life Insurance Co. v. Glenn* and *LaRue v. DeWolff, Boberg & Associates Inc.* put a spotlight on fiduciary governance and could prompt lawsuits against retirement plan fiduciaries accused of breaching their duties under the Employee Retirement Income Security Act. In this analysis, Winston & Strawn attorneys Michael S. Melbinger and Ranjan S. Emani lay out strategies identified "by reading between the lines" of the decisions, arguing that employers and fiduciaries can take proactive steps to ensure that plan disputes are channeled through a plan committee and that the committee's decisions receive deference from the court.

Strategies for Fiduciary Best Practices After *LaRue* and *Glenn*

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The U.S. Supreme Court handed down two landmark decisions this year affecting retirement plan fiduciary governance on a broad scale: *Metropolitan Life Ins. Co. v. Glenn* and *LaRue v. DeWolff, Boberg & Associates Inc.*

These decisions may facilitate plan participants' rights to bring successful actions against retirement plan fiduciaries. In *MetLife v. Glenn*, 128 S. Ct. 2343, 43 EBC 2921 (2008), the court picked up on dicta from its landmark 1989 *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 10 EBC 1873, decision and held that where an employer/plan administrator both determines an employee's eligibility for benefits and pays benefits out of its own assets, the employer/administrator has conflicting interests and the courts must take account of the conflict when determining whether the employer or other fiduciary has abused its discretion. In *LaRue*, 128 S. Ct. 1020, 42 EBC 2857 (2008), the Supreme Court seemed to elevate some administrative errors to the level of a fiduciary breach and held that the Employee Retirement Income Security Act authorizes a plan participant to recover for fiduciary breaches even if those breaches affect only the participant's individual account.

However, by reading between the lines, these cases can provide strategies to protect employers and fiduciaries and to facilitate their proper exercise of fiduciary duties. Employers should consider making changes and

acting proactively to implement these strategies now to help ensure that plan disputes are channeled through a plan committee and that the committee's decisions receive deference from the courts.

Many corporate officers, employees, and board members serve as ERISA fiduciaries. For a fiduciary accused of breaching its duties under ERISA, the stakes are high. ERISA Section 409 imposes personal liability on a fiduciary that breaches its duty. ERISA authorizes lawsuits against fiduciaries by participants, beneficiaries, the plan administrator, other fiduciaries, and the Department of Labor. Federal courts have held that ERISA's fiduciary duty is "the highest duty known to the law."

Step One: Responding to *LaRue*. The primary strategy for protecting employers and fiduciaries and to facilitate their proper exercise of fiduciary duties in light of the *LaRue* decision is simply to draft benefit plan documents, summary plan descriptions, and other participant communications in a manner that directs the greatest number and broadest category of possible disputes into the plan's claims procedures. Based on guidance from the *LaRue* decision and other case law (and experience), we suggest that employers and plan fiduciaries consider the following:

1. Update language in the plan and SPD to clarify that all claims for benefits, including claims related to alleged administrative errors, must be filed according to the claims procedures of the plan and ERISA. Note that the language in item 3 below is the beginning of this process.

2. Add language requiring that a participant or beneficiary exhaust his or her remedies under the plan's claims procedures before the participant can file a lawsuit. (ERISA does not expressly require a participant to exhaust his or her remedies under the plan's claims procedures, although nearly all the federal courts have.) This can help save the plan and the employer from the expense of litigation.

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3. Add a "statute of limitations" to the plan documents, participant benefit statements, and other employee communications (along with contact information on notice of errors) for participants' claims related to administrative errors. For example, the plan, SPD, and any investment related communications could state the following:

Participants have the right to direct the investment of their accounts among the investment funds . . . The Plan Administrator will furnish each participant with a statement of his or her account balance at least [monthly]. The participant should review this statement for accuracy. If a participant believes that his or her investment directions have not been followed, the participant must file a written claim with the Plan Administrator by the later of (i) six months after the investment direction was allegedly made and (ii) 15 days after two account statements have been provided to the Participant by the Plan Administrator [or name of provider].

ERISA contains no statute of limitations with respect to benefit claims. Courts' usual practice is to borrow the limitations period of the most closely analogous state or federal statute. However, where the plan specifies a limitations period that is shorter than the statutory period, most courts will enforce it, if the limitation is reasonable. This also helps facilitate the proper exercise of fiduciary duties by bringing problems forward on a timely basis to permit corrections to be made. Ideally, the plan's statute of limitations would be no longer than the corresponding limitations found in service provider contracts.

4. Review plan investment and administrative contracts to confirm they do not limit the liability of external plan fiduciaries and service providers (such as through indemnification or exculpation provisions). The appropriate parties, and not the plan, should bear the risk of loss for their mistakes, where feasible.

5. Be certain that the *Firestone* grant of discretion language in the plan and SPD is as clear and broad as it can be.

Step Two: Responding to *MetLife v. Glenn*. Regarding *MetLife v. Glenn*, employers and fiduciaries should establish procedures, create a claims review committee, and draft benefit plan documents and SPDs to create the greatest likelihood that, if the committee's decision is challenged in court, the court will apply a deferential standard of review to the decision.

Broadly, speaking, employers and fiduciaries (including plan administrators) can, as a matter of best practices, take three steps to reduce the appearance of conflict: (i) individuals responsible for deciding claims should be separated from those responsible for financial decisions of the employer, (ii) during the claims review process, detailed records should be kept to reflect that any conflict had no bearing on the ultimate outcome, and (iii) those who decide claims should have an incentive to resolve the claim accurately and disregard whether the outcomes favor the claimants or the employer.

Based on guidance from *MetLife v. Glenn* and other case law (and experience), we suggest that employers and plan fiduciaries consider the following:

1. The company and/or administrator should have "taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccur-

rate decision-making irrespective of whom the inaccuracy benefits." *MetLife v. Glenn*.

2. Consider creating separate committees for plan investments, plan administration, and benefit claims, or at least consider having subcommittees for these purposes, excluding those with potentially conflicting interests or duties. Take care not to mix up the duties and actions of either committee between settlor functions and fiduciary functions. If the employer uses a single committee, clarify its responsibilities.

3. Wall off claims administrators from those interested in (i) company finances and (ii) benefit plan finances and investments. Make sure that the documentation (and reality) is clear that the entity paying claims is separate from the entity administering the plan and/or reviewing benefit claims. Following appropriate corporate formalities in the appointment of the administrator and/or claims review committee will help establish a separate, stand-alone entity.

4. Consider outsourcing claims reviews and/or appeals. If an employer or committee does this, the plan—not the employer—should hire the outsourced provider directly.

5. Evaluate the overall composition of the benefit claims committee. Take care to appoint individuals to the committee who will be capable of issuing decisions that are protected from being challenged on conflict of interest grounds.

6. Consider appointing an "hourly," "nonexempt," or similar lower-level (nonexecutive) employee to the benefit claims committee, to mitigate any potential for conflict.

7. Those who review the claim also should make the decision on the claim. That is, individuals on the claims committee should delegate their duties to subordinates. Where possible, claims administrators should be shielded from knowledge of the dollar amount of a particular claim.

8. Keep records refuting circumstances that could suggest a higher likelihood that a conflict of interest affected the benefits decision. Keep records refuting any suggestion that the administrator has a history of biased claims administration.

Consider more "claims for benefits" than just those brought to the dispute stage, to help establish this record. Even informal questions or concerns from plan participants should be documented along with a description of how the issue was resolved.

9. Create (or select third-party administrators who have created) detailed procedures and practices designed to result in accurate decision-making based on objective measures.

10. The employer should put in place a review process to check whether fiduciaries and/or administrators are abiding by the procedures. Third-party administrators who fail to abide by agreed procedures should be responsible for their failures.

11. Take steps to promote accuracy by imposing management checks that penalize inaccurate decision-making and decision-making that is based on who benefits from the inaccuracy. For employees on the benefit claims committee, the company should consider taking into account the accuracy of claims decisions in evaluations, promotions, and compensation.

12. Be mindful that when a claim is denied, and the committee relied upon any internal rules, guidelines or protocols, ERISA regulations require the committee to

inform the claimant and either (i) set forth the rule, guideline or protocol on which the denial was based or (ii) state that the plan will make it available to the claimant at no charge upon request. A claimant can request copies of all documents, records, and other information relevant to the claim *regardless of whether such information was considered in making the adverse determination.*

"The claims procedures for a plan will be deemed reasonable only if . . . the claims procedures contain administrative processes and safeguards designed to ensure and to verify that benefit claim determinations are made in accordance with governing plan documents and that, where appropriate, the plan provisions have been applied consistently with respect to similarly situated claimants," the court said in *Metlife v. Glenn* (emphasis added).

ERISA regulations also require the plan to provide the claimant with access to, and copies of, all relevant documents, records and other information, including documents and information that demonstrate compliance with the foregoing requirement.

13. Accurately record all decisions by the claims administrators. The administrator should list all factors that it used or considered in the decision-making process. These records should be reviewed periodically to ensure that decision policies consistently are being followed.

14. Emphasize in the committee charter and in training that the benefit claim committee's role is only to apply the terms of the plan under which the employer has elected to provide benefits to its employees, without consideration of the employer's interest. (Courts have recognized that employers have a strong interest in paying benefit claims under their plans—equal to their interest in saving a few dollars by denying claims.)

15. Emphasize in the committee charter and training that the employer created the committee to manage a plan through which the employer chooses to provide its employees with benefits. Also, emphasize in the committee charter and training that the employer created, funds, and administers the plan for its employees' benefit. The employer's business profits do not derive from managing ERISA plans. The employer remains free to end the plan altogether. The employer's business plan is not dependent on its denying benefits, because it could decide to deny all benefits simply by ending the plan should the benefits become too burdensome. (When an employer sponsors a plan and then administers it, the fact that the benefits cost money is insufficient to support the presumption of a conflict; that cost is the product of its election to provide the employees with benefits.) Emphasize that the employer's administration of its plan is driven by no interest other than its will to apply the terms under which it elected to provide benefits to its employees.

16. Bear in mind that having the employer's inside or outside counsel attend benefit claims review meetings may result in a loss of attorney-client privilege. "When an attorney advises a fiduciary about a matter of dealing with the administration of a benefit plan, the attorney's client is not the fiduciary personally, but rather the trust's beneficiary." *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.* (D.D.C. 1982). If the general counsel or other in-house attorneys are to attend committee meetings, consider having

them attend as an advisor, or as counsel to the committee, rather than as a committee member.

17. Review the plan documents and SPDs from top to bottom to improve or clarify the definitions of key terms and the eligibility for and amount of benefits provided.

Step Three: General Recommendations. Plan fiduciaries should consider the following general steps to improve compliance and protect themselves from liability.

1. To demonstrate procedural prudence, create records and keep minutes of all committee meetings and the review and analysis of fiduciary issues. In litigation, simply being able to show that the fiduciary went through the process of analyzing a matter can be as important as the analysis itself.

2. Train the plan's fiduciaries to assist them in understanding and implementing the requirements of steps one and two above. Training should instruct decision-makers to disregard the financial impact on the employer. Fiduciaries should acknowledge, in writing, that they understand the proper procedures to follow when making a claims decision. The employer or fiduciary should maintain a record of training activity, documenting any necessary follow-up. (Some insurers ask whether the fiduciaries have received training.)

3. Review the plan, committee charters and other governance documents, policies, and procedures from top to bottom to improve governance, documentation, and compliance and to correct any inconsistencies, updates in plan practices, and operational deficiencies (such as deficiencies highlighted in recent court decisions, including the failure to properly constitute a committee, the failure of that committee to hold meetings, or the failure of committee members to attend meetings). Make certain that the line of delegation of authority (and liability) flows clearly and unambiguously away from the board of directors, and does not inadvertently vest fiduciary responsibility in the employer and/or its senior executives.

4. To enhance the argument that the employer's board of directors is acting only as a settlor, not as a fiduciary, have the plan document (as opposed to a board resolution) designate the fiduciary committee as the plan's named fiduciary, appointing the committee members by title, not by name. (Note: a 2008 decision in *Beesley v. Int'l Paper*, 44 EBC 1038 (S.D. Ill.), cast doubt on whether this works, but there is still no downside to this approach and it may help prevent board liability.)

Alternatively, if the employer believes it is desirable to shift fiduciary responsibility and liability from the board to the CEO, draft documents so that the CEO appoints the fiduciary committee.

Not Exhaustive List of Measures. This is not an exhaustive list of measures to protect employers and fiduciaries from potential liability, and no strategy can guarantee that someone will not sue the fiduciaries or that a court will not rule against them. However, under the current case law, these strategies, when appropriately implemented, can improve the fiduciaries' chances of prevailing.

Plan administrators, not just counsel, need to pay attention to these issues and suggestions for dealing with *LaRue* and *MetLife*. Fiduciaries who might not be aware of these issues (or aware that they are fiduciaries) should be specifically advised of the issues raised by the two cases.