Health Plan Developments Grab Bag

Collectively Bargained Retiree Medical Benefits are Not Presumed to be Vested in The Sixth Circuit

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Earlier this week, the U.S. Supreme Court issued its opinion in *M&G Polymers USA, LLC v. Tackett.* The decision discarded a presumption that retiree medical coverage provided pursuant to the terms of a collective bargaining agreement that were tied to ones status as a retiree or pensioner meant that such coverage was vested for the retirees and could not be changed even though the collective bargaining agreement never mentioned vesting or lifetime with respect to the retiree medical coverage. This means that employers with collectively bargained retiree medical plans who can be sued in the Sixth Circuit no longer start with the legal scales tipped in the favor of the retirees when the collective bargaining agreements are reviewed. The Court made it clear that the collective bargaining agreements are to be reviewed under "ordinary contract law."

The entire series of decisions leading to the *Tackett* Supreme Court decision make it clear that the critical document is the collective bargaining agreement. In fact in all of the preceding *Tackett* decisions (7), there is only one mention of an ERISA plan or summary plan description document and it was only a passing reference.

The critical take away here is that HR departments and employee benefits types, including ERISA attorneys, need to work closely with the labor attorneys and parties negotiating the collective bargaining agreements regarding the contents of such agreements and to preserve documentation of the intent behind the collective bargaining agreements

In a concurring opinion, in which three of the justices joined, the collective bargaining agreement governs, but if a court finds an ambiguity, then extrinsic evidence may be brought in to help clarify the collective bargaining agreement. So working with labor attorneys and the parties negotiating the collective bargaining agreement to be sure that the evidence the labor laws consider in construing the meaning of a collective bargaining agreement is preserved will be critical. Those items may not be the same as the items that ERISA types would think of preserving.

The good news is that employers operating within the Sixth Circuit (Michigan, Ohio, Kentucky and Tennessee) are no longer bound a presumption against their interest and may be able to negotiate to change retiree medical coverage with the collective bargaining units representing their employees. This decision dealt with the cost of coverage and did not look at changes in the underlying benefits under such retiree medical coverage, that has been considered in other lower court decisions and has not yet been before the U.S. Supreme Court. So while it is clear the presumption used in the 6th Circuit is gone, there are still quite a few questions regarding when retiree medical benefits coverage and the contents of the coverage can be changed. These will likely remain factual based inquiries into each collective bargaining agreement, and when ambiguity is found the extrinsic evidence around the intent of such collective bargaining agreement's provisions.

Nothing in this decision alters the previous court interpretations regarding whether an employer is free to alter retiree medical coverage or benefits provided to employees that are not represented by a collective bargaining unit or that is not covered by a collective bargaining agreement. . (This decision of course would not change any retiree medical coverage which an employer is required to maintain pursuant to a court order due to prior litigation or a prior bankruptcy court order to maintain the coverage.)

Employer's Employment Actions Related to Employee's Refusal to Provide Social Security Number When Number is Needed to Comply with Federal Laws (e.g., the Affordable Care Act and HIPAA) Not Religion Based Discrimination

As employers begin the process of collecting both employees' and the employees' dependents and spouses social security numbers to comply with the reporting requirements under the Affordable Care Act ("ACA"), there may be pockets of resistance to providing such data. An individual in Ohio who refused to provide his social security number to his employer based on his religious beliefs and who was either not hired or terminated (the opinion mentioned both) had his

claim for discrimination against him based on his religion dismissed by the trial court and affirmed by the Sixth Circuit Court of Appeals.

In this case, the Sixth Circuit followed the precedents in the 4th, 8th, 9th and 10th Circuits in finding that Title VII does not require an employer to reasonably accommodate an employee's religious beliefs if such accommodation would violate a federal statute. Since the ACA requires collection of an employee's and the employee's spouse and dependent's social security numbers, an employer can require an employee to provide those numbers so that the employer can fulfill its reporting requirements under the ACA. While not all Circuit Courts have ruled on this to date, five of the Circuits are in favor and can be cited as supporting the requirement that the social security number must be provided by the employee, in the event any employee chooses to challenge providing it.

HHS Announced It Will Start Another Round of Privacy and Security Audits

Recently the U.S. Department of Health and Human Services announced that it intends to begin another round of HIPAA Privacy and Security audits. This follows a number of rather high profile cyber security incidents in the news. Is your group health plan and your IT system ready for such an audit or prepared for a cyber-attack? Has your IT system documented its periodic security reviews?

Is your HIPAA privacy training current? Do the employees who handle medical records know whether the records are HIPAA protected or protected by some other law and how to handle such records and who may access them? Are your policies up to date? Do you know what government agencies are "public health authorities"?

Are all of your business associate agreements up to date and are you sure you have identified all of the business associates for your health plan? If your entity provides services to health plans or health care providers, you may be a business associate and need to have appropriate compliance policies and procedures.

Have you considered how the changes in the clinical laboratory regulations may require you to change how testing results are handled for your employees? While the latest big change to the HIPAA Privacy rules were issued on January 25, 2013, there were two other pieces of federal guidance that impact the handling of medical information since that date that might impact your business and its operations. This is a quick reminder to verify that your policies, procedures and periodic evaluations are occurring before an auditor comes to visit or you must answer to one of the various government agencies or authorities that can investigate any potential issue arising under the HIPAA Privacy and Security requirements. This is just a reminder to remember to keep your HIPAA Privacy and Security policies and procedures operational with periodic compliance checks documented. Privacy and Security need to be functioning to do their job to protect your health plan, not just sitting on a shelf.