

Top Ten Things You Should Know About Employee Benefits

AIDS Legal Referral Panel

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Top Ten Things You Should Know About Employee Benefits

- (1) What law governs?
- (2) What claims and remedies are available?
- (3) What do I need to know about ERISA benefit claims & the administrative process?
- (4) How do employee benefits interact with other benefits (e.g. SDI, SSDI)?
- (5) How do employee benefit and ADA/FEHA disability claims overlap?
- (6) When & how can employee benefits be a component of damages in a non-benefits case?
- (7) How do severance and settlement agreements affect employee benefit claims?
- (8) How do employee benefits implicate personal injury matters?
- (9) How do employee benefits implicate estate planning and family law matters?
- (10) If I'm helping with an employee benefit claim, what should I know about social media and surveillance?

What Kind of Benefits Are We Talking About?

- Pension benefits, for example:
 - Traditional defined benefit pension plans
 - 401(k) plans
 - 403(b) and 457 plans (like 401(k) for government employees)
 - Employee Stock Ownership Plans (ESOPS)
 - Pension benefits through government plan (CalPERS, CalSTRS, CERL)
- Health insurance
- Short-term and long-term disability benefits (STD and LTD)
- Life insurance, accidental death and dismemberment (AD&D) benefits
- Some severance benefits

1. What Law Governs?

- What is ERISA and when does it apply?
- The Employee Retirement Income Security Act of 1974 (ERISA) is the federal law that governs most employee benefits provided by private employers or employee organizations (unions).
- Benefits governed by ERISA must be provided pursuant to an ERISA plan.

1. What Law Governs?

- What benefits are NOT governed by ERISA?
- Individual insurance policies
- Governmental plans
 - California Public Employees' Retirement System (CalPERS)
 - County Employees Retirement Law (CERL)
 - Most other benefits provided by public employers (unless ERISA-governed plan sponsored by union)
- Church plans
- A few other exceptions
 - Payroll practice exemption
 - No covered employees
 - No administrative scheme
- Governing law = applicable statutes or ordinances (e.g. CERL) or contract law

2. What Claims and Remedies Are Available?

- What claims and remedies are available *under ERISA*?

Claim	Remedies
Claim for benefits under the plan (§ 502(a)(1)(B))	Benefits under terms of plan
Breach of fiduciary duty	Make-whole relief
Interference with protected rights (§ 510)	Make-whole relief
Civil penalties for failure to provide certain documents (§ 502(c))	Discretionary, up to \$110/day per violation
Criminal penalties (sought by DOL)	Penalties to DOL

- Other forms of monetary damages (e.g. consequential or punitive damages) and emotional distress damages are NOT available.
- Attorneys' fees for prevailing party

2. What Claims and Remedies Are Available?

- What claims and remedies are available for *non-ERISA* benefits?
- Statutory claims (e.g. CalPERS benefits)
 - Claim for benefits under the applicable statute
 - Interest
 - Attorneys' fees depending on applicable statute.
- Insurance benefits pursuant to a contract – insurance bad faith claims.
 - Benefits due under the policy
 - Interest
 - Bad faith damages – consequential economic losses, emotional distress, attorneys' fees.
 - Punitive damages if insurer acted with fraud, oppression, or malice.

3. What Do I Need to Know About ERISA Benefit Claims & the Administrative Process?

- Mandatory Exhaustion of Administrative Claim Process for benefit claims
- In court – very limited new evidence on merits
- Short deadlines – length depends on type of claim, plan document
 - E.g. appeal of pension benefit denial – 60 days
 - E.g. appeal of LTD benefit denial – 180 days
 - Denial letter must specify deadline.
- No jury and no “trial”
- De novo v. abuse of discretion review

4. How Do Employee Benefits Interact With Other Benefits (e.g. SDI, SSDI)?

- STD / LTD benefits under plan
 - Typically provides 55-65% of pre-disability earnings
- Often there's an offset provision in STD/LTD plan for "other income benefits"
 - Defined by the plan.
 - Offsets often include SDI, SSDI
 - May require application for these benefits
 - May offset for disability pension benefits
- SSDI and SDI benefits do NOT get reduced by other income benefits.
- Idea is for all benefits combined to provide approx. 2/3 of pre-disability earnings.

4. How Do Employee Benefits Interact With Other Benefits (e.g. SDI, SSDI)?

- Offsets typically not applicable to pension benefits (e.g. ERISA pension and SS retirement benefits)
- Different disability standards:
 - STD/LTD - typically 24 months of “own occupation,” then “any occupation.”
 - SDI – unable to work in your job. (Low standard.)
 - SSDI – unable to engage in substantial gainful employment. (High standard.)
 - Disability pension – depends on plan.
- Different waiting periods:
 - SDI – 7 day waiting period
 - SSDI – 5-6 months
 - STD/LTD – depends on plan.
- Length of time can receive benefits:
 - STD/LTD – depends on plan (E.g. 5 yrs, until age 65. Check for limitations for mental health, subjective evidence, etc.).
 - SDI – 1 year.
 - SSDI – until retirement age.

5. How Do Employee Benefit Claims Overlap with ADA/FEHA Disability Claims?

- Disability benefits (STD/LTD/Disability pension, also SDI, SSDI) – claiming unable to work.
- ADA/FEHA claims (wrongful termination, failure to accommodate disability) – claiming able to work/ do your job.
- It may be possible to pursue both, but need to make sure claims are consistent (or at least not inconsistent).
- And make sure medical forms for one will not be problematic for other.

6. When and How Can Employee Benefits Be a Component of Damages In a Non-Benefit Case?

- ERISA claim:
 - “I am entitled to benefits under the terms of the plan.”
 - “The plan administrator breached its duties under ERISA by providing me with inaccurate information about plan benefits.”
 - If it’s an ERISA claim, but you bring it as state law claim (“insurance company was negligent or breached contract in denying my benefits,” or “my employer was negligent in providing me inaccurate benefit information”) → **ERISA PREEMPTION.**

- In contrast - claim for benefits as component of damages =
 - “I am not entitled to benefits under the terms of the plan, but absent my employer’s unlawful acts, I would be.” or
 - “I am not a plan participant (so my employer did not owe me any ERISA fiduciary duties), but absent the employer’s (non-benefit related) unlawful acts, I would be entitled to benefits.”

 - E.g. wrongful termination (claiming lost wages. Can also claim lost benefits, e.g. pension service credits, 401(k) contributions.)
 - E.g. wage and hour misclassification as independent contractor (claiming unpaid wages, can also claim lost benefits, e.g. pension benefits, 401(k) contributions.)

7. How Do Severance and Settlement Agreements Affect Employee Benefit Claims?

- When and how ERISA claims can be waived
 - Consider who the parties are
 - Consider what claims are being waived
 - Consider explicit carve-out in agreement for employee benefits, especially if you know there is an on-going claim.
 - At very least, make sure employee knows about potential waiver of employee benefit claims.
- How separation agreements can be used to increase benefits
 - Employer pays for COBRA premiums for X months
 - Keep as employee for X months, and keep paying for health, life, LTD benefits. (And maybe keep eligible for bonus, vesting stock options, etc.)
 - Or keep as employee for X months, with pension service continuing to accrue (e.g. where right before important vesting date)

8. How Do Employee Benefits Implicate Personal Injury Matters?

- Subrogation clauses:
- Health insurance plans want to get reimbursed whenever possible.
- Subrogation clauses in health insurance plans – if participant receives any monetary recovery from third party for injuries for which seeking health insurance coverage, we have right to reimbursement.

- Car accident, causes injuries to Joe, \$100k in health coverage.
- Joe sues negligent driver, settles for \$150k. Health insurance claims entitled to reimbursement for the \$100k.

- Review plan document – it controls scope of right to reimbursement.

9. How Do Employee Benefits Implicate Estate Planning and Family Law Matters?

- Plan administrator is required to follow the terms of the plan, and the plan-related documents.
- Under ERISA, beneficiary designation controls.
- If survivor pension benefits go to spouse pursuant to statute or plan, that governs – NOT what is in divorce decree or separation agreement.
- When dealing with employee benefits in estate planning or family law matters, be sure know what plan / governing statute says; be sure updating beneficiary designation forms is part of process.

10. If I'm Helping With an Employee Benefit Claim, What Should I Know About Social Media and Surveillance?

- Social media postings:
 - Be careful of what can be misconstrued. Your own postings and others.
 - Privacy settings.
 - Air on the side of caution.

- Insurance companies DO surveil.
 - Be careful of what can be misconstrued.
 - Don't exaggerate. Don't use words like "never."



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Kirsten Scott is a partner in the San Francisco firm of Renaker Hasselman Scott, LLP. She represents plaintiffs in various employee benefit matters under ERISA and government employee benefit programs, including claims for pension and disability benefits and breach of fiduciary duty. Kirsten also represents clients with respect to medical leaves of absence, unpaid wages, and severance negotiation.

Kirsten is an active member of the American Bar Association, and regularly speaks and writes on a variety of employee benefit-related topics. She is a contributing author to Employee Benefits Law (BNA) and ERISA Litigation (BNA). She has been an AIDS Legal Referral Panel (ALRP) panel attorney since 2013, and formerly served on the ALRP Board of Directors from 2012-2014.