Pension Plan Fix-It Handbook

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The Importance of Retirement Plan Record Retention — Whose Job Is It Anyway?

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A former participant calls an employer-sponsored retirement plan's service center. He just turned 65; after working almost 20 years for the company, his service ended 24 years ago. He asks about his accrued pension benefit. The call center service representative tells him that there is no record of his service, and provides information on how to file a claim.

The former participant files a claim, providing information to the plan's benefits committee.

As a member of that committee, you are charged with following the plan's rules and protecting plan assets. Benefits can be paid only under the plan terms. The challenge, in this case, is that the benefit requested is attributable to service with a company acquired 10 years after the participant resigned.

In your opinion as a committee, the former participant cannot prove that he is entitled to the benefit, and you deny the claim. The former participant sues, but a federal district court confirms your decision. The former participant then requests more information and appeals to the 9th U.S. Circuit Court of Appeals, which finds that the burden of proof lies with the company.

In a recent case, the 9th Circuit held that the burden of proof shifts to the employer (the defendant in this case), when a claimant has made a *prima facie* case that he is entitled to a benefit but lacks access to key information that the defendant controls. The appellate court sent the case back to the district court for a new ruling. The case is *Estate of Barton v. ADT Sec. Servs. Pension Plan,* No. 13-56379 (9th Cir., April 21, 2016).

Facts of the Case

Bruce Barton, the now-deceased plaintiff, worked for American District Telegraph Co. and/or its affiliates from November 1967 until he resigned in September 1986. He also worked for an unrelated moving company and served in the Marine Reserves at some point during this period. Tyco International Management Co. acquired ADT in 1997.

There were two pension plans, one referred to as the 1968 Plan and the other as the 1985 Plan. The 1968 Plan governed service through Dec. 31, 1975, and the 1985 Plan governed service as of Jan. 1, 1976. The 1985 Plan covered ADT and any of its affiliate companies that adopted the plan and were acknowledged as joining that plan by the board.

When Barton turned 65 in 2010, he contacted the pension plan recordkeeper regarding his benefits. The pension plan administrator indicated that it could not find any records of his employment with ADT, and sent him information on the process for filing a pension benefit claim. Barton provided the information requested, and was informed that he hadn't proven that he had a vested benefit. He was told that the next step was to file a claim with the plan's Employee Benefits Committee.

Barton filed a claim with the committee, and noted that two former colleagues had provided information similar to his and were awarded a pension benefit. The information provided by Barton included:

- a letter from the president of ADT dated Nov. 11, 1997, congratulating Barton on completing 10 years of service;

  copies of ADT-issued key cards and identification/business cards;

- W-2 statements from 1980-1983 and 1986 listing ADT as the employer;
- paystubs from 1981 and 1985 from ADT;
- personnel data maintenance forms from 1984, 1985 and 1986 with salary information; and

See *Andersen,* p. 2

Andersen (continued from p. 1)

- Social Security Administration documentation summarizing FICA tax withheld from 1968-1980.

Barton also provided other documentation during the administrative appeal. However, the committee held that there were "no Plan records indicating your eligibility for participation in the Plan or your eligibility for benefits under the Plan." The committee also noted that it wasn't clear whether Barton had the 10 years of continuous service necessary for vesting.

Barton requested copies of all plan documents and other information affecting the claim. He specifically requested a Tyco summary plan description, among other things. The committee responded, but there is nothing to indicate that a 1983 Tyco SPD was provided. This is important because many times, participating employers are listed in the SPD.

District Court's Ruling

Barton filed suit in U.S. District Court for the Central District of California. However, this court found that the committee had not abused its discretion in denying benefits. The district court also held that Barton lacked standing to prove a violation of the ERISA disclosure rules because he did not have a "colorable claim" — in other words, a plausible legal claim strong enough to have a reasonable chance of being valid.

Barton appealed to the 9th Circuit. It conducted a *de novo* review of how the district court applied ERISA's standard for reviewing fiduciary decisions, and found that the lower court had done so correctly. However, the appellate court found that the district court incorrectly placed the burden of proof on Barton "for matters within the defendant's control," and remanded the case to the district court.

In its summary, the circuit court noted that in health and welfare claims such as illness or long-term disability, the burden is on the claimant. But in this case, the defendant controls the information that determines whether the claimant is entitled to a benefit. The district court had placed the burden on Barton to prove his employer participated in the plan and that he worked the required number of hours. However, the 9th Circuit found that the defendants were in a better position to determine which were the participating employers.

The IRS and federal tax regulations require that records be retained as long as their contents may become material in the administration of any internal revenue law. As a result, records for retirement plans should be kept until all benefits have been paid, the trust has been dissolved and sufficient time has passed such that the plan will not be the subject of an audit.

The district court found that Barton could not prove he worked 1,000 hours per year for the 20 years he was employed by ADT or its affiliates. The 9th Circuit said asking a participant to provide hours worked over 20 years is unreasonable and inconsistent with ERISA's goals, especially because Barton was not told that he had to keep a log of his hours worked.

One of the three judges on the 9th Circuit panel dissented, arguing that the claimant, not the plan administrator, bears the burden of proof. This judge said the evidence presented did not show that Barton had the necessary amount of continuous service or that the companies he worked for participated in the plan.

How Long Should Records Be Maintained?

Retirement plans, whether defined benefit or defined contribution plans, are designed to be long-term. Participants build up benefits or accounts over time. As a result, the records of transactions for the plans may cover many, many years.

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See *Andersen*, p. 3

Andersen **(continued from p. 2)**

Bottom Line for Plan Sponsors

Time will tell if other federal appellate courts besides the 9th Circuit adopt the same interpretation in record-retention lawsuits by plan participants. With this in mind, plan sponsors should work with their actuaries and plan recordkeepers to clean up data as much as possible for the current plan and any acquired plans. Employers in the 9th Circuit will want to pay close attention to the district court's new decision on remand.

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