Pension Plan Fix-It Handbook

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If You Have a Top Hat Plan, This Court Case Is Worth Watching

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Defining the terms of a top hat plan can be one of the most thorny aspects for plan sponsors setting up a nonqualified deferred compensation plan for senior managers or highly compensated employees. A federal district court case provides some insights into how one court views these plans.

The Maryland federal district court in *Bond v. Marriott International Inc.,* No. 10-cv-1256-RWT, (D. Md., Aug. 9, 2013), found the plan in question was a top hat plan and that the statute of limitations didn't apply to the suit, even though the complaint was filed 20 years after the participant left employment. The case is now being appealed by Marriott, and the U.S. Department of Labor recently filed a friend-of-the-court brief on behalf of the former employees.

Background on Top Hat Plans

ERISA exempts certain plans from vesting, funding and participation requirements aimed at protecting the rights of employees in employer-sponsored qualified plans. The exemption applies to unfunded plans — those for which employers use their general assets, rather than formally setting aside funds for the benefits provided — maintained by an employer *primarily* for the purpose of providing deferred compensation for a *select group* of management or highly compensated employees.

Little guidance exists on what constitutes a select group of management or highly compensated employees. It's generally beneficial for plan sponsors to limit these plans as much as possible, to help ensure they have top hat status. There have been myriad court cases in which the court compared the number of participants in the top hat plan with the total number of participants. If the percentage was low, typically 5 percent or less, the plan was considered to cover a select group.

In addition, there have been some outliers. Despite covering a larger percentage of employees, the court still has deemed the plans to be top hat plans based on other factors. These often include the salary level of the top hat participants compared with non-top hat participants, their job responsibilities and whether the top hat participants are in a position to negotiate their own compensation packages. To address the matter, DOL in 1990 issued Advisory Opinion 90-14A, which narrowed the exemption.

In a footnote to Advisory Opinion 90-14A, DOL stated:

> [T]he Department's position that the term "primarily", as used in the phrase "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" in sections 201(2), 301(a)(3) and 401(a)(1), refers to the purpose of the plan (i.e., the benefits provided) and not the participant composition of the plan. Therefore, a plan which extends coverage beyond "a select group of management or highly compensated employees" would not constitute a "top hat" plan for purposes of Parts 2, 3 and 4 of Title I of ERISA.

But not all courts have followed this advisory opinion.

Examining *Bond v. Marriott International*

The *Bond v. Marriott* case illustrates that despite plan sponsors' best efforts to carefully define top hat plans, they still can be sued over them.

Both DOL and plan sponsor advocate American Benefits Council — in conjunction with corporate advocacy organizations the U.S. Chamber of Commerce and the ERISA Industry Committee — recently filed friend-of the-court briefs with the 4th U.S. Circuit Court of Appeals in support of Marriott International and the plaintiffs in *Bond v. Marriott International.* We will discuss

See *Andersen,* p. 2

Andersen (continued from p. 1)

the main issues raised in the case and the amicus briefs filed on behalf of both sides.

From 1963 to 1990, Marriott provided stock bonus awards to employees. ERISA was enacted in 1974, and Marriott determined that its plan met the act's top hat exemption. After DOL issued Advisory Opinion 90-14A in May 1990, Marriott amended the plan to reflect the opinion and informed participants of the changes.

In 2009, a former participant filed a complaint against Marriott in a Maryland county circuit court alleging a benefits reduction that violated ERISA. There were a number of legal actions taken in the case from 2009 to 2013, including amending the original complaint, moving to dismiss the state case and filing it with the U.S. District Court for the District of Columbia.

That court found the Marriott plan was a top hat plan. Despite the fact that the claim was filed 20 years after the participant left employment, judges ruled the statute of limitations didn't apply because the plan didn't have a claims appeal procedure.

Note: *ERISA provides this definition of a top hat plan, in part:*

...a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.

Key Points From the Briefs

Both briefs are worth reading, if only to get a sense of how other courts have addressed the issue of defining a top hat plan and how that could affect employer plan sponsors.

Definition of a Top Hat Plan

Citing Shakespeare, the dictionary, other court cases and its own Advisory Opinion 90-14A, DOL's position is that the word "primarily" is an adverb that modifies the prepositional phrase "for the purpose of providing deferred compensation." It does not modify "for a select group of management or highly compensated employees." It doesn't imply that the word "primarily" means that employees outside the "select group" can be included in the plan. In DOL's view, the plan should be limited only to management or highly compensated employees.

Note: *At one point, the Marriott nonqualified plan included 2,500 employees, but participation dropped to fewer than 200 after the plan was amended for DOL Advisory Opinion 90-14A.*

The ABC brief states that the court should not give any deference to the DOL interpretation, as it was contained in a non-binding opinion letter and not delivered through any regulatory process. In addition, the DOL's interpretation "is contrary to the statute's plain text, legislative purpose, and public policy." In its appeal filed in the 4th Circuit in June 2015, Marriott also mentions that no deference should be given to a DOL footnote.

Statute of Limitations

Other than mentioning the court's findings in its brief, DOL did not specifically address the statute-of-limitations issue.

Stating that "ERISA claims accrue upon formal denial of a claim," the court found that the statute of limitations didn't apply because Marriott didn't adopt a claims procedure until after the lawsuit was filed. Consequently, it was impossible for the plaintiffs to file a claim and receive a formal denial and "accrue a cause of action."

The ABC's brief notes that failure to apply the statute of limitations leads to an "absurd rule" by which the statute of limitations will never be triggered. This would result in "open-ended" liability for plan sponsors, and would discourage employers from establishing such plans. The brief cites *Cotter v. E. Conference of Teamsters Ret. Plan,* which found that where there wasn't a formal denial of benefits, courts should look to "some event other than a denial" that alerted participants of the ability to file a claim and thus start the statute of limitations.

Note: *Marriott notified participants of the plan's top hat status in a 1978 prospectus. After amending the plan, Marriott informed participants of the changes due to the DOL advisory opinion. The changes included the changes in the 1991 Proxy Statement, as they required*

See *Andersen*, p. 3

Andersen (continued from p. 2)

shareholder approval. The proxy statement was sent to shareholders and participants.

The amicus brief goes on to say that,"[t]he district court's rule would have considerable negative consequences by effectively eviscerating the statute of limitations for ERISA claims."

What Does This Mean for Plan Sponsors?

More than 40 years after ERISA was enacted, there is still no bright-line standard for defining what constitutes a top hat plan. While DOL advisory opinions are frequently referred to in litigation cases, they are not law, and courts can, and have, rejected DOL's views.

If you have a top hat plan, you should follow this case and its latest appeal.

Finding out More

For more information about adding a nonqualified deferred compensation plan, see ¶245 in Thompson Information Services' *Pension Plan Fix-It Handbook*. ❖

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