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WHAT DOES IT MEAN TO "RETIRE"?

By
John L. Utz
Utz, Miller & Eickman, LLC
jutz@utzmiller.com

It is puzzling why so many deferred compensation and retirement plans use the words "retire" and "retirement" in important ways, without defining those terms. It is doubly puzzling because the terms usually aren't intended to have their common meaning – that is, they don't mean when a person has ceased working for good, ready to fill her or his days with grandchildren or fishing, or both. Instead, the notion is usually that the person has terminated employment with the employer maintaining the plan, with some additional condition being met. That additional condition might be the employee having reached a particular age, or perhaps having reached a particular age and completed a certain number of years of employment. Or the term might be used simply to describe the time when a participant has chosen to have benefits commence (following termination of employment).

A federal appeals court, in *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009), was recently asked to consider whether the administrator of a "top hat" plan correctly determined what the term "retirement" meant. This was an important question because the answer determined whether a former executive's first wife, to whom he was married when he terminated employment, or instead his second wife, to whom he was married when his benefits commenced, was entitled to receive any survivor annuity payable under the joint and survivor annuity distribution option elected by the former executive. The survivor annuity was, under the plan's terms, payable to the survivor designated at the time of the participant's "retirement."

The administrator concluded that the term "retirement" meant the date benefits commenced. As a consequence, the participant's second wife was the party entitled to the survivor annuity. The court upheld the administrator's decision, reaching its conclusion through application of an abuse of discretion standard of review. The court held that although the plan's terms were ambiguous, the administrator's construction of the plan's terms was not unreasonable nor made in bad faith.

As to the background of the case, the executive had resigned from the employer, a bank, at age 53, and taken a position with another bank. Although the executive was no longer employed by the bank, he did not begin receiving benefits under the bank's top hat plan at the time he terminated because the plan did not permit benefit payments to begin until a participant had reached age 55. The executive had, though, apparently made an election as to the form of payment by the time he terminated employment. He had chosen a joint and survivor annuity, with his surviving spouse as the joint annuitant. This created the complication that led to the lawsuit. At the time he left the bank, the executive was married to his first wife (although they had been separated for over a year). The couple was, however, divorced eight months before the executive's 55th birthday, when payments could first commence. Interestingly, though it received little attention from the court, the parties' divorce decree awarded the first wife 50 percent of any annuity payments the executive was to receive under the plan.

Several months following the divorce from his first wife, the executive married his second wife. A couple of months thereafter he turned age 55 and began receiving monthly annuity benefits. The amount of his monthly payment was calculated based on his life expectancy and that of his second wife.

The first wife filed a claim with the plan asking that she, rather than the second wife, be recognized as the former executive's designated survivor. Under plan's terms, the survivor annuity was to be paid to the survivor designated at "retirement." The first wife argued that for this purpose the term "retirement" should mean the executive's termination of employment with the employer sponsoring the plan, rather than the date benefits commenced. The plan administrator disagreed, concluding that "retirement" for purposes of determining the correct survivor was when annuity benefits commenced.

The court discussed the appropriate standard of review for its examination of the administrator's decision. Despite contrary standards for top hat plan benefit disputes in two other circuit courts (the Third and the Eighth), the Ninth Circuit concluded that it should apply to a top hat plan the same standard of review it would to any other arrangement subject to ERISA. For a plan containing discretionary language, such as the top hat plan at issue, this meant the standard of review was the abuse of discretion standard set forth in last year's Supreme Court decision in *Metropolitan Life Ins. Co. v. Glenn*.

As part of the *Glenn* analysis, a court must take into account whether the decisionmaker, in this case the plan administrator, operated under a conflict in interest and, if so, must weigh that conflict as a factor in determining whether there was an abuse of discretion. Although the plan at issue was administered by a committee of the employer, and the plan was unfunded (so the financial burden of paying benefits fell on the employer), the court found there to be no conflict of interest. That is because if the administrator had identified the wrong survivor, this would have had no effect on the actuarial cost of the plan to the employer, since the plan's joint and survivor payments were actuarially adjusted for the life expectancies of the executive and his beneficiary. In fact, as it turned out, there was actually a financial benefit to the plan, and therefore to the employer, by reason of the administrator's determination that the second wife was the joint annuitant because the second wife died during the pendency of the lawsuit (and the participant remained alive). This meant no survivor annuity would be paid upon the participant's death, which was to the financial benefit of the plan (and, therefore, to the employer). Because, however, there was no indication that the second wife's death had been anticipated by the administrator when it made its decision (the second wife died after that decision), the administrator had not operated under a conflict of interest at the time it made its decision.

Lesson. As is so often the case with benefit claim litigation, the lesson of the *Sznewajs* decision is that drafters should carefully define the important terms in a top hat plan (or other compensation-related document). More broadly, the lesson is to remove as much ambiguity from documents as is practical, without weighing them down with verbiage so voluminous as to make them unuseful or inappropriately inflexible. A second lesson is that the inclusion of *Firestone*-type standard of review language in the plan document for any arrangement subject to ERISA, such as a top hat plan, is a plus for the party deciding appeals (typically the plan administrator). In fact, the inclusion of *Firestone* language can be an advantage even under the approach taken by the Third and Eighth Circuits, where a special standard of review may apply to top hat plan benefit disputes.

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Utz, Miller & Eickman, LLC
7285 West 132nd St.
Suite 320
Overland Park, KS 66213

Phone: 913.685.0970
Fax: 913.685.1281

Matthew J. Eickman
meickman@utzmiller.com
Phone: 913.685.0749
Fax: 913.685.1281

Eric N. Miller
emiller@utzmiller.com
Phone: 913.685.8150
Fax: 913.685.1281

John L. Utz
jutz@utzmiller.com
Phone: 913.685.7978
Fax: 913.685.1281

www.utzmiller.com