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**TOPIC: Combination Bonus and Deferral Plan Subject to ERISA**

**CITATIONS:** *Tolbert v. RBC Capital Markets Corp.,* No. 13-20213, 2014 WL 3408230, (5th Cir. July 14, 2014); *Emmenegger v. Bull Moose Tube Co.* 197 F.3d 929, 933 (8th Cir.1999).

**SUMMARY:** The Fifth Circuit Court of Appeals held that a deferred compensation plan through which key employees received annual bonuses and were able to defer both bonuses and other income was an "employee pension benefit plan" governed by the Employee Retirement Income Security Act of 1974 (ERISA). Although the primary purpose of the plan was to provide bonuses rather than retirement income, the court concluded that the plan was governed by ERISA because it provided for the "systematic deferral" of income "extending to the termination of covered employment or beyond." Because this plan was limited to a select group of management or highly compensated employees, it was likely eligible for the ERISA "top hat" exemption and the case was remanded for consideration of that issue. However, this case emphasizes the importance of ERISA compliance even by plans which are primarily bonus plans if they provide for the deferral of income for periods extending to termination or beyond.

**BACKGROUND:** Plaintiffs are former employees of RBC Capital Markets Corp. ("RBC") and participants in the RBC wealth accumulation plan (the "Plan"). When plaintiffs left their jobs at RBC, they forfeited part of their Plan accounts. All parties agreed that the forfeitures followed the terms of the Plan, but the plaintiffs argued that the Plan was covered by ERISA and that the forfeitures violated ERISA.

RBC argued that the Plan was not subject to ERISA, or—if it was an ERISA plan—was a "top hat" plan and therefore exempt from ERISA's vesting, funding and fiduciary duty requirements. The lower court granted summary judgment in favor of RBC, finding that the Plan was a bonus plan and thus not covered by ERISA.

The Plan at issue was the vehicle through which RBC both awarded bonuses and profit sharing type contributions and allowed executives to defer receipt of vested contributions as well as other base compensation. The lower court had concluded that the Plan was not "primarily" designed to provide retirement income and therefore was not covered by ERISA. Voluntary deferrals were immediately vested under the Plan but company contributions were vested on dates set by the Plan committee and participating executives could elect the distribution date. Participants could choose "in service" distributions, or distributions commencing upon termination or retirement, payable in the form of a lump sum or installments of up to ten years. If no deferral election was made, amounts were distributed upon vesting.

The Plan purpose was to promote "long-term savings and allow such employees to share in [RBC's] growth and profitability, if any." The Plan language specifically stated that if it were determined to be an "employee pension benefit plan" covered by ERISA, it was intended to be an "unfunded plan of deferred compensation maintained for a select group of management or highly compensated employees and, therefore, exempt from many ERISA requirements."

**FACTS:** In addressing the application of ERISA to the Plan, the Circuit Court sited the two-pronged test from 29 U.S.C § 1002 (2)(A)(i)-(ii) defining an ERISA "employee pension benefit plan" as a plan which (i) "provides retirement income to employees" or (ii) "results in a deferral of income by employees for periods extending to the termination of covered employment or beyond."

Analyzing the first prong, the Circuit Court agreed with the lower court that the Plan was not primarily intended to provide retirement income to employees because "the primary thrust of the plan is to reward employees during their *active* years." (Emphasis added.) Evaluating the evidence, the court determined that the Plan was primarily intended to retain key employees by awarding bonuses and other incentives; not to provide retirement income.

However, the court went on to consider the second prong of the test. It concluded that the Plan would fall within the scope of ERISA if it met either the first or the second prong. Here, because the Plan was specifically designed to allowed employees to defer vested amounts to termination of employment and beyond, providing for payment of retirement benefits in installments over up to ten years, the court concluded that the Plan "fits comfortably within the meaning of subsection (ii)."

The court rejected RBC's argument that this was a bonus plan, exempt from ERISA by U.S. Department of Labor regulations 29 C.F.R § 2510.3-2(c) because in this case the Plan was not limited to the provision of bonus compensation but also provided for the "systematic deferral" of both bonuses and other income after vesting to termination of employment and beyond. The Circuit Court distinguished *Emmenegger v. Bull Moose Tube Co*. 197 F.3d 929, 933 (8th Cir.1999) on which the lower court had relied, in which the Eighth Circuit Court of Appeals held that deferred compensation provided through an employer's phantom stock plan did not trigger ERISA coverage because any deferral until retirement or post-termination periods occurred "strictly at the option of the participant." *Emmenegger* was distinguished on the grounds that the analysis in *Emmenegger* was based on the Department of Labor "bonus program" regulation (cited above) which states that an employee pension benefit plan "shall not include payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond." The court reasoned that the Plan in this case was not merely a "bonus program" but rather was a self-described "deferred compensation plan" through which payments were systematically deferred into retirement.

**RESULT:** Thus, the Fifth Circuit Court reversed, determining that the Plan did fall within the scope of ERISA, and sent this case back to the district court to review the facts and decide whether the Plan came within the "top hat" exemption.

**RELEVANCE:** This case emphasizes the danger of assuming that bonus plans are not covered by ERISA. Bonus plans which allow participants to systematically defer compensation to termination of employment or beyond may be subject to ERISA. Bonus plans including a long term deferral option should be carefully planned and drafted to come within the ERISA "top hat" exemption in order to avoid ERISA's vesting, funding and fiduciary requirements.

***WRNewswire* #14.07.31 was written by Marla Aspinwall of Loeb & Loeb, LLP.**



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