

Making Sure Your Plan Language Matches What You Are Doing – New Class Action Lawsuit Examines How a Common Definition of “Compensation” Was Applied

PUBLISHED: January 3, 2019

A recent class action lawsuit emphasizes the importance of clarity in plan language, particularly the definition of compensation – a frequent source of errors. As most plan administrators are aware, what elements of pay are counted as compensation for various purposes of the plan can vary and change from time to time, particularly when payroll systems or vendors change or employers adopt different compensation designs. In *Karlson v. ConAgra Brands Inc.*, Case No. 1:18-cv-8328 (N.D.Ill., Dec. 19, 2018), the plaintiff has asserted that the plan sponsor should have treated certain post-termination bonuses as benefitable compensation under the terms of the plan.

According to the complaint, the plan provided that participants could elect to make pre-tax and after-tax elective contributions, while the employer was required to make matching contributions (and, in limited circumstances, nonelective contributions) equal to a percentage of a participant's compensation. Also according to the complaint, the plan defined “compensation” to include certain post-termination payments in a manner that generally appears to follow the 415 regulations on post-termination compensation.

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Specifically, according to the plaintiff, compensation was defined under the plan to include payments made by the later of (i) 2.5 months after severance from employment, or (ii) the end of the calendar year that includes the date of severance, if the payments are payments that, absent a severance from employment, would have been paid to the participant while the participant continued in employment with ConAgra and are bonuses. The plaintiff then alleges that the plan fiduciaries re-interpreted the plan to exclude such bonuses in 2016, thus failing to take elective deferrals from such payments and not matching such deferrals. This, the plaintiff argues, was a failure to follow the terms of the plan in not permitting contributions on the former participants' bonuses, and thereby a breach of their fiduciary duties potentially affecting several thousand participants.

Interestingly, the named plaintiff was, prior to his own termination of employment in 2016, Senior Director of Global Benefits, and a member of the Administrative Committee that is now a defendant, while the defendants include that committee and the Vice President of Human Resources.

Plan sponsors should take notice of this case and take the opportunity to review their plan language, particularly the definition of compensation, for its "fit" for what the payroll system is doing in practice. It is not uncommon for plans to have complicated definitions of compensation for benefit purposes that are different from the definitions used for the 415 limits or nondiscrimination testing. The various definitions may include or exclude certain types of compensation other than base salary for different purposes, and a company's compensation or payroll practices and vendors may change from time to time in ways that impact the definitions. This suit is an important reminder to make sure that the plan language is clear, up to date with current payroll practices, and consistent with what is actually applied.

If you have any questions, or would like to review your plan's language regarding items such as the definition of compensation, please contact your Groom lawyer.