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View From Groom: Criminal Conviction for ERISA Disclosure or Reporting Violations—Potential for Criminal Liability

BY JASON H. LEE

Employee Retirement Income Security Act of 1974 (ERISA) requires plan administrators to provide various documents to plan participants, including: summary plan description, summary of material modification, summary annual report and periodic pension benefit statements.[1] In addition, plan administrators must file annual reports (Forms 5500) with the Department of Labor (DOL).[2] Violating these disclosure and reporting obligations, or the obligation to retain records necessary to verify information on annual reports,[3] could lead to criminal liability under Section 501 of ERISA or under 18 U.S.C. § 1027.

Although these statutory provisions use the terms ''willfully'' and ''knowingly'' in describing the prohibited conduct, an employer could be convicted of violating these provisions without having intended to engage in criminal conduct.

[1] ERISA §§ 102, 104, and 105.
[2] ERISA §§ 103 and 104.
[3] ERISA § 107.

Jason H. Lee (jlee@groom.com) is a principal at Groom Law Group, Chartered. He focuses on investment, fiduciary and prohibited transaction issues under Title I of ERISA. He has assisted clients with investments in private funds, large prohibited transaction correction projects (and related excise tax issues) and Department of Labor investigations.

While the limited resources available to the federal government suggests that criminal prosecutions are unlikely absent egregious facts—such as theft of plan assets—employers should, nevertheless, understand the potential for criminal liability for acts that are not as morally reprehensive as theft or fraud.

In addition, at least under Section 1027, a corporate officer acting on behalf of an employer may be convicted separately from the employer. Thus, attorneys advising a corporate officer signing a Form 5500, for example, should discuss with the corporate officer his or her potential criminal liability for filing a report that contains a false statement or omits required information.

This article describes some of the courts of appeals cases that have interpreted these statutes.

ERISA Section 501

Section 501 of ERISA provides that—

> Any person who *willfully* violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined no more than $100,000 or imprisoned more than 10 years, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $500,000.

While the word ''willfully'' in other criminal statutes has been interpreted as requiring a subjective intent to violate a criminal prohibition known to a defendant,[4] the Eleventh Circuit has held that the level of intent re-

[4] *See, e.g.*, *Cheek v. United States*, 498 U.S. 192, 201 (1991) (interpreting the term ''willfully'' used in certain criminal tax statutes as requiring proof of defendant's ''voluntary, inten-

quired under Section 501 is merely that a defendant acted voluntarily, and not accidentally or mistakenly.[5] None of the other courts of appeals appears to have interpreted the term ''willfully'' in Section 501.

The Eleventh Circuit case involved ''a steel producer's payment of kickbacks, in the form of illegal pension payments, to union officials in violation of the Labor Management Relations [Act] . . . and its failure to notify the employee pension plan's participants that the plan had been amended to provide for such payments, as required by [ERISA].''[6] The steel producer was convicted of having violated Section 501 at the district court level and, on appeal, argued that the district court had made a mistake in charging the jury. The steel producer argued that, while Section 501—by using the term ''willfully''—requires a showing that a defendant acted ''with the specific intent to do something the law forbids,'' the district court had charged the jury that ''a defendant who knowingly and intentionally committed acts which [violated Part 1 of ERISA] and . . . were not committed accidentally or by some mistake'' was guilty of violating ERISA within the meaning of Section 501 of ERISA.[7] The Eleventh Circuit, however, disagreed with the steel producer. The court reasoned that, if Section 501 required proof of ''specific intent'' to engage in illegal conduct—such that a defendant's ''good faith'' belief that its action is legally permitted would be a valid defense—Congress would not have added a statutory good faith defense in Section 108 of ERISA.[8] Based on this reasoning, the court ruled that Section 501 requires proof of ''general intent'' and that the district court had properly charged the jury.[9]

18 U.S.C. § 1027

Section 1027 of Title 18, United States Code, provides that—

> Whoever, in any document required by title I of the Employee Retirement Income Security Act of 1974 (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or *knowingly* conceals, covers up, or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such title to be published or any information required by such title to be certified, shall be fined under this title, or imprisoned not more than five years, or both (emphasis added).

Thus, conviction under Section 1027 could be based on making a false statement or on concealing a fact.[10]

Multiple courts of appeals have ruled that Section 1027 does not require a defendant to have known that an act or omission is prohibited by law—that is to say that Section 1027 does not require ''specific intent.''[11]

For example, the Second Circuit has held that the ''term 'knowingly' [as used in Section 1027] requires proof of a voluntary, conscious failure to disclose without ground for believing that such non-disclosure is lawful or with reckless disregard for whether or not it is lawful.''[12] The court first explained that, if Congress wanted to require specific intent to engage in illegal conduct ''it could have done so explicitly in which case the statute would have read: 'Whoever knowingly fails to disclose any fact, *knowing the disclosure to be required* . . . .' ''[13] The court then concluded that ''knowingly'' should be given some meaning other than ''mere conscious or voluntary commission of acts'' and chose the ''reckless disregard'' standard as being consistent with (i) the legislative intent of the Welfare and Pension Plans Disclosure Act (to which Section 1027 applied before ERISA was enacted), which was to ''protect the interests of participants in employee welfare and pension plans by requiring the disclosure and reporting to participants and beneficiaries of financial information which would enable them to effectively check potential mismanagement of the plans,'' and (ii) ''the fact that persons subject to [Section 1027] occupy fiduciary positions and bear concomitant responsibilities.''[14]

The Sixth Circuit has agreed with the Second Circuit that the term ''knowingly,'' as used in the concealment prong of Section 1027, required reckless disregard for whether or not the action is lawful, and not a specific intent to do what the law forbids.[15]

In contrast to these cases, the Eighth Circuit has ruled that a conviction under Section 1027 requires a

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tional violation of a known legal duty'') (internal quotation marks omitted).

[5] *United States v. Phillips*, 19 F.3d 1565, 1582-1584 (11th Cir. 1994) amended, 59 F.3d 1095 (11th Cir. 1995).

[6] *Id.* at 1566.

[7] *Id.* at 1583 (brackets in original; internal quotation marks omitted).

[8] *Id* at 1583-84. Section 108 of ERISA provides that a ''good faith'' reliance on a regulation or written ruling of the Secretary of Labor is a defense to an ERISA Section 501 prosecution.

[9] *Phillips*, 19 F.3d at 1584.

[10] As to the false statement prong, the Eighth Circuit ruled that the government needs to prove more than that a defendant had ''acted with reckless disregard for whether or not [information it provided] was false.'' *United States v. Cacioppo*, 460 F.3d 1012, 1016-17 (8th Cir. 2006). The court ruled that ''[r]ecklessness'' reflects ''something less than knowledge of a statement's falsity'' and cannot form the basis for a finding that a defendant had made a false statement ''knowing [it] to be false'' as the law requires. *Id.* But this does not mean that the government must obtain direct evidence—a confession—that the defendant knew that he was making a false statement. Whether a defendant possessed the requisite knowledge can be proved through circumstantial evidence. *Id.* at 1021.

[11] *See United States v. Martorano*, 767 F.2d 63, 66 (3d Cir. 1985) (''We . . . conclude that a general intent (a failure to disclose) rather than a specific intent (a failure to disclose knowing that such failure violates a statutory disclosure requirement) is all that is required to prove a violation of § 1027.'') (parenthesis in original); *United States v. S & Vee Cartage Co., Inc.*, 704 F.2d 914, 918-9 (6th Cir. 1983) (stating that § 1027 does not require a ''specific intent to do what the law forbids''); *United States v. Tolkow*, 532 F.2d 853, 858 (2d Cir. 1976) *overruled on other grounds by United States v. Brutus*, 505 F.3d 80 (2d Cir. 2007) (''[A]ctual knowledge of the duties imposed by the pertinent statute is not a requisite element of the crime defined by 18 U.S.C. § 1027 . . . .'').

[12] *Tolkow*, 532 F.2d at 858. *Tolkow* involved a trustee of a union welfare fund who caused the fund to make loans to a business in which the trustee had a financial interest, and the failure to disclose the loans in the fund's annual returns signed by the trustee and required by the Welfare and Pension Plans Disclosure Act. *Id.* at 855-56. (Prior to the enactment of ERISA, 18 U.S.C. § 1027 referred to ERISA's predecessor: Welfare and Pension Plans Disclosure Act.)

[13] *Id.* at 858 (emphasis added).

[14] *Id.* at 858.

[15] *S & Vee Cartage*, 704 F.2d at 919.

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showing that the defendant knew that he was violating the law.[16] The Eighth Circuit case involved an employer's concealment of the correct number of employees in documents provided to a multiemployer plan.[17] The court ruled that the term ''knowingly'' in Section 1027 not only modified the concealment but also modified whether the concealed fact was required to be disclosed.[18] The court reasoned that Supreme Court decisions indicated that an ambiguity in a criminal statute's *mens rea* requirement should be read as criminalizing a narrower range of conduct.[19] Thus, the court held that a conviction under Section 1027 for knowing concealment requires the government to prove ''both that the defendant knowingly conceal[ed], cover[ed] up, or fail[ed] to disclose a[] fact that she was required to disclose *and* that she knew that she was obligated to disclose it.''[20]

Corporate Officer Liability

A corporate officer—through which the employer acts—can be convicted of criminally violating 18 U.S.C. § 1027 in connection with the employer's violation of Section 1027.

The Sixth Circuit affirmed a lower court's decision convicting two corporate officers of violating 18 U.S.C. § 1027 along with the corporation for falsifying forms required to be kept under ERISA and sent to a multiemployer plan.[21] The Sixth Circuit did not base its ruling on an *alter ego* theory, but on the individual corporate officers' direct violation of Section 1027.[22] This is consistent with the language of Section 1027, which imposes liability on ''[w]hoever'' makes a false statement or conceals information.

That said, it appears that the *alter ego* theory could also be used to hold corporate officers liable. The *alter ego* theory has been used for noncriminal violations of ERISA,[23] and the reason for deploying the *alter ego* argument—to prevent ''ERISA's effectiveness . . . [from being] undermined'' by putting ''form . . . [over] substance''[24]—would seem equally applicable for criminal violations relating to ERISA.[25]

An employee can also be convicted of a separate crime of aiding and abetting the employer's violation of Section 1027. See, e.g., *United States v. Odom*, 736 F.2d 150, 151-52 (5th Cir. 1984).

Conclusion

While convictions under ERISA Section 501 or 18 U.S.C. § 1027 would require proof of ''intent'' on the part of the defendant, this may not be a high hurdle to clear. Corporate officers asked to assume responsibility over ERISA reporting and disclosures should be made aware of potential criminal liability for both the company and the officers themselves.

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[16] *Cacioppo*, 460 F.3d at 1019.
[17] *Id.* at 1014.
[18] *Id.* at 1017.
[19] *Id.* at 1018-19.
[20] *Id.* at 1019 (emphasis and brackets in original; internal quotation marks omitted).
[21] *S & Vee Cartage*, 704 F.2d at 914. The court also ruled that the corporate officers' convictions for engaging in a criminal conspiracy with the employer corporation was supported by the fact that the employer was ''a distinct legal entity'' separate from the corporate officers. *Id.* at 920. Corporate officers' criminal liability for a corporation's actions is not unique to ERISA cases. *See United States v. Amrep Corp.*, 560 F.2d 539, 545-46 (2d Cir. 1977) (finding corporate officers guilty of criminal fraud, where each of the officers ''knew or could have known by the exercise of reasonable diligence that the statements made [by the corporation's sales representatives] to prospective purchasers of [land] were false.'')
[22] *S & Vee Cartage*, 704 F.2d at 915-16. *See also United States v. Krimsky*, 230 F.3d 855, 857-58 (6th Cir. 2000) (individual who indirectly owned a plan sponsor found criminally liable under 18 U.S.C. § 1027 for ''submitting false ERISA reporting forms'').
[23] *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-21 (2d Cir. 1987). In *Lowen*, individual corporate officers of an investment management company were found jointly and severally liable with the management company for fiduciary breach under ERISA. *Id.* The management company invested client plan assets in entities in which one or more officers held an interest and in entities that made kickback payments to affiliates of the management company. *Id.* at 1211-13. In finding the individual corporate officers liable, the court noted ''extensive intermixing of assets among the [defendant] corporations, and among the corporations and individual defendants, without observing the appropriate formalities, . . . and wholly inadequate capitalization of the corporations.'' *Id.* at 1221. The court also noted that ''individual defendants . . . took . . . [the kickbacks] for themselves in the form of salaries, bonuses and unsubstantiated travel and expense reimbursements, and left the corporate defendants with virtually no net worth.'' *But see Sasso v. Cervoni*, 985 F.2d 49, 51 (2d Cir. 1993) (holding that a corporate officer's ''dominant role in the affairs of a corporate employer,'' by itself, was not sufficient to make the officer liable for the corporation's liability for plan contributions under ERISA).
[24] *See Lowen*, 829 F.2d at 1220.
[25] The *alter ego* theory has been used to support a criminal conviction. *See United States v. Finnigan*, 504 F.2d 1355, 1359 (8th Cir. 1974) (finding a corporate officer liable for mail fraud and noting that ''[t]he corporation . . . was nothing more than the alter ego of [the defendant]'').