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Fifth Circuit Expands ERISA Coverage of Deferred Compensation Plans

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Deferred compensation plans that may result in the deferral of some employee compensation to termination of employment, but only as a matter of happenstance or employee choice, are often administered under the assumption that they are exempt from ERISA. The Fifth Circuit's decision last week in *Tolbert v. RBC Capital Markets Corp.*, however, throws that assumption significantly into question. Reversing a grant of summary judgment in favor of RBC, the Court held that a deferred compensation plan is governed by ERISA whenever it has the "effect" of deferring income to the end of employment or beyond. *Tolbert v. RBC Capital Markets Corp.*, No. 13-20213, 2014 WL 3408230, at *4-5 (5th Cir. July 14, 2014).

At dispute in the case were deferred compensation amounts that the plaintiff employees contractually forfeited by virtue of their voluntary resignation or termination for cause from RBC. Plaintiffs argued that they were entitled to the forfeited deferred compensation as vested and accrued employee benefits that could not be forfeited under ERISA. *Id.* at *3. RBC, on the other hand, argued that the plan was not covered by ERISA, and, even if it was, it was an unfunded "top hat" plan that was exempt from ERISA's non-forfeiture provisions. *Id.*

The legal framework for the dispute is provided by 29 U.S.C. § 1002(2)(A): a "pension plan" is "any plan, fund or program . . . maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—(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, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan."

The Fifth Circuit agreed with RBC and the district court that the plan did not qualify as an ERISA plan under subsection (i) because it was not designed for the purpose of paying retirement income. *Id.* at *3-4 (reaffirming *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575 (5th Cir. 1980) and *Boos v. AT&T, Inc.*, 643 F.3d 127, 134 (5th Cir. 2011)).

But the Court held that subsection (ii), unlike subsection (i), does not require that a plan be designed to pay retirement or post-termination income to be covered by ERISA; rather, the only requirement for ERISA coverage is that the plan "results in" a deferral of income to termination of employment. *Id.* at *4. And the Court read the term "results in" broadly, covering any plan that defers income to termination as "an effect, issue, or outcome" from the plan. *Id.* (internal quotation marks omitted).

This holding represents a sharp break from cases such as *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929 (8th Cir. 1999), which have generally been understood to stand for the proposition that only plans that *necessarily* defer income to termination or beyond as a matter of *plan design* qualify as ERISA plans within the meaning of subsection (ii). Under those decisions, a plan that defers income until termination or beyond only at the option of the employee, or because the deferral of income happens to occur close to the time of termination of employment, would not be covered by ERISA.

In *Tolbert*, however, the Fifth Circuit read the language of subsection (ii) both literally and broadly, threatening to sweep into ERISA any deferred compensation plan that has the "effect" of deferring some income to the end of employment or beyond, even if the deferral is not systematic, and even if it occurs only as a matter of employee choice. In doing so, the Court distinguished *Emmenegger* and its progeny as being narrowly limited to plans that meet the definition of a "bonus plan" under Department of Labor regulations. See *Tolbert*, at *6; 29 C.F.R. § 2510.3-2(c). And it distinguished prior Fifth Circuit precedents as relating solely to subsection (i) or as relating to plans that did not actually defer income at all. *See, e.g., Murphy*, 611 F.2d 570 (plan providing annual royalties); *Boos*, 643 F.3d 127 (plan providing reimbursement for telephone expenses).

Plans that meet the regulatory definition of "bonus plan" should thus remain unaffected by *Tolbert*. And plans that satisfy ERISA's requirements for "top hat plan" status—a fact-specific determination that the Fifth Circuit did not reach in *Tolbert* and that the district court will grapple with on remand—

should be only minimally impacted, as such plans are statutorily exempt from ERISA's vesting, funding, and fiduciary requirements. *See* ERISA §§ 201(2), 301(a)(3), 401(a)(1). It is also possible that future Fifth Circuit cases could adopt a narrowing construction of *Tolbert*'s broader pronouncements, as even the panel decision recognized that ERISA was not intended by Congress to function as an "elastic girdle" that can or should be stretched to cover all plans. *Tolbert*, at *3 (quoting *Murphy*, 611 F.2d at 575). In the meantime, however, employers with deferred compensation plans that operate within the Fifth Circuit should assess whether *Tolbert* would subject those plans to ERISA, and, if so, should consider whether plan amendments could be adopted that would minimize the risk that the plan could be deemed to be governed by ERISA.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Gregory Jacob, an O'Melveny partner licensed to practice law in the District of Columbia, and Raghav Ahuja, an O'Melveny associate licensed to practice law in the District of Columbia and New York, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.