

About That Pension Check... A Miscalculation Case With Broader Implications

Article By:

Craig A. Day

Suzanne G. Odom

The Ninth Circuit Court of Appeals recently addressed several issues of first impression in [Bafford v. Northrop Grumman \(9th Cir. April 15, 2021\)](#), a lawsuit involving retirees who received vastly overstated pension benefit estimates from the plan's recordkeeper reminds employers of the importance of careful administration. The case highlights the need to ensure that electronic recordkeeping systems and tools align with the plan terms. Participant requests for plan or benefit information using online portals or other electronic means still demand timely and accurate responses as required by ERISA's disclosure requirements.

Northrop Grumman sponsored a defined benefit plan and delegated administration of the plan to an Administrative Committee, which contracted with a recordkeeper to produce benefit statements for participants. Two participants used the recordkeeper's online benefits portal to calculate their monthly pension benefits. Unfortunately, the online tool produced statements that grossly overstated the monthly pension benefits. After the participants retired and began receiving the monthly pension benefits they were told they would receive, the recordkeeper notified them of the error and dramatically reduced their monthly benefits.

The participants sued the company, the plan administrator, and the recordkeeper, alleging that:

- The company and the Administrative Committee violated the pension benefit statement requirements of ERISA and breached their fiduciary duties by providing incomplete and inaccurate benefit statements; and
- The recordkeeper was liable for professional negligence and negligent representation under state law.

On appeal from the district court, the Ninth Circuit agreed that the participants' ERISA fiduciary claims should have been dismissed, aligning with the First and the Fourth Circuit's view that a named fiduciary is only liable for a fiduciary breach if **they are performing a fiduciary function**. The court said that calculating pension benefits using a pre-set formula is a ministerial function, not a

fiduciary function. So a miscalculation error would not create a breach of fiduciary duty claim.

The Ninth Circuit also dismissed the pension benefit statement claim because of a procedural matter. But used the opportunity to address a question of first impression among the circuit courts. The question being whether a request for a pension benefit statement using an online tool would be treated the same as one made “in writing” under ERISA Section 105(a). Citing the definition of “writing” in Black’s Law Dictionary (11th ed. 2019) as the “intentional recording of words in a visual form,” the Ninth Circuit rejected the notion that an online pension benefit statement request could **never** trigger the fiduciary obligation to respond.

Finally, addressing an issue of particular concern to plan service providers, the Ninth Circuit found that ERISA does not preempt the state law claims of professional negligence asserted against the recordkeeper. The court was concerned that a finding of preemption would leave the plaintiffs without a remedy. Under the existing two-pronged preemption analysis in the Ninth Circuit, a state law has a reference to ERISA plans if it acts immediately and exclusively on ERISA plans or if the existence of ERISA plans is essential to the law’s operation. The court held that state negligence laws satisfied neither requirement. To be preempted by ERISA under the second (connection with) prong, the claim must “bear on an ERISA-regulated relationship.” Because the participants’ claims only arose out of the relationship between the recordkeeper and the participants, not an ERISA-regulated relationship, ERISA did not preempt the law under this prong of the test.

This case has important practical implications for plan fiduciaries and plan recordkeepers and their relationship to each other. These concepts are not limited to pension plans. Electronic systems, portals, and online tools are now the primary way employee benefits are offered and administered and need to be closely managed for compliance with the requirements of ERISA and the plan. We recommend plan administrators address these important compliance measures and review the [Department of Labor’s cybersecurity guidance](#) with their recordkeepers.

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