

THE NONQUALIFIED ADVISOR

An Independent Resource for Plan Sponsors and Participants of Nonqualified Plans

Client News Bulletin

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2008 Supreme Court Cases Impact Nonqualified Plans

According to attorney, Michael Melbinger of Winston & Strawn LLP, the 2008 term was a bad one for qualified and nonqualified plan sponsors. Supreme Court's rulings *Metropolitan Life Ins. Co. v. Glenn and LaRue v. DeWolff, Boberg & Associates, Inc.* made it significantly easier for plan participants to bring legal challenges against the decisions of employers and retirement plan fiduciaries.

So, what is a plan sponsor to do? In the qualified retirement plan area, there is a laundry list of things to do, especially when one considers the fiduciary liability risks added by the recent decisions. However, a non-qualified deferred compensation plan sponsor probably only needs to consider a few small changes to improve the likelihood that a court will review its benefit under the abuse of discretion standard.

Among the steps that plan sponsors should consider taking are the following:

1. Review the plan, policies and procedures from top to bottom to improve governance, documentation and compliance and to correct any inconsistencies, updates in plan practices and operational deficiencies. Make certain that the line of delegation of authority (and liability) flows clearly and unambiguously away from the board of directors, and does not inadvertently vest responsibility in the employer and/or its senior executives.
2. Add a "statute of limitations" to the plan documents (and any summary or other employee communications) for participants' claims.
3. Update language in the plan (and any summary) to clarify that all claims for benefits, including claims related to alleged administrative errors, must be filed according to the claims procedures of the Plan and ERISA.
4. Take steps to reduce potential bias by walling off claims administrators from those interested in firm finances.
5. Appoint individuals to the investment and/or administrative committees who will be capable of issuing decisions that are protected from being challenged on conflict of interest grounds.

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