U.S. Department of Labor

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Judges' Deskbook: Employee Retirement Income Security Act of 1974 (ERISA)

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The decision is captioned *U.S. Dep't. of Labor, Employee Benefits Security Administration, Complainant v. ______________________, Respondent*. An aggrieved party has 20 days in which to appeal the ALJ's decision, or it becomes the final decision of the Secretary. 29 C.F.R. § 2570.69. Appealed decisions are reviewed by the Senior Policy Advisor of the Department's Employee Benefits Security Administration (EBSA), formerly the Pension Benefits Welfare Administration (PWBA).

Notably, in most cases, the Respondent will *not* be the company; rather, it will be a “plan administrator.” Under the statute, the plan administrator may be held liable for the payment of any penalties, although there is no prohibition against the company paying the penalty from its profits. Under no circumstances, however, may civil money penalties be paid from assets of the plan. The statutory provisions at 29 U.S.C. § 1002(16)(A)(i) and (ii) define the plan "administrator" as the entity or individual specifically designated as such by the terms of the plan's operating instrument or, in the absence of such designation, the plan's sponsor.

I. Statutory and Regulatory Authority

A. Statutory authority

Employee Retirement Income Security Act of 1974 (ERISA) at 29 U.S.C. §§ 1001 *et seq.*

B. Regulatory authority

29 C.F.R. Parts 2520 (annual report requirements), 2560 (rules and regulations for administration and enforcement), and 2570 (procedures for the assessment of civil penalties under ERISA Section 502(c)(2))

C. Secretary's Order 1-2003

Purpose. To delegate authority and assign responsibilities for the administration of the Department of Labor's responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA), the Welfare and Pension Plans Disclosure Act (WPPDA) and the Federal Employees' Retirement System Act of 1986 (FERSA), and to change the name of the Office of the Assistant Secretary for Pension and Welfare Benefits and the Pension and Welfare Benefits Administration (PWBA).

Authority and Directives Affected. This Order is issued pursuant to 5 U.S.C. 301; 29 U.S.C. 551, *et seq*.; and 5 U.S.C. 5315. This order supersedes Secretary's Order 1-87, 52 Fed. Reg. 13139 (Apr. 21, 1987), and the memoranda to Meredith Miller, on Oct. 28, 1998, 63 Fed. Reg. 59339 (Nov. 3, 1998), and on Dec. 16, 1998, 63 Fed. Reg. 71506 (Dec. 28, 1998).

Background. ERISA places responsibility in the Department of Labor for the administration of a comprehensive program to protect the interests of participants and beneficiaries of private sector employee benefit plans. Secretary's Order 1-87 delegated authority for this program to the Pension and Welfare Benefits Administration (PWBA), which was headed by the Assistant Secretary for Pension and Welfare Benefits who reported to the Secretary of Labor. FERSA requires the Department of Labor to, among other things, administer and enforce the fiduciary responsibility, prohibited transaction, and bonding provisions of FERSA. Secretary's Order 1-87 also delegated these responsibilities to PWBA. In more recent years, statutes such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Newborns' and Mothers' Health Protection Act of 1996, the Mental Health Parity Act of 1996, the Women's Health and Cancer Rights Act of 1998 and the Child Support Performance and Incentive Act of 1998 amended ERISA. Pursuant to Secretary's Order 1-87, PWBA has carried out the Department's additional responsibilities under these Acts. Changing the agency's name to the Employee Benefits Security Administration (EBSA) will more clearly communicate the agency's mission of protecting private sector employee benefits. Restating the delegations contained in Secretary's Order 1-87, and including an additional delegation regarding claims of governmental privileges, previously published separately, will provide a single source for questions regarding the Assistant Secretary's current authority and responsibility.

Re-Designation of the Assistant Secretary for Pension and Welfare Benefits and the Pension and Welfare Benefits Administration.

A. The title and position of Assistant Secretary for Pension and Welfare Benefits is re-designated Assistant Secretary for Employee Benefits Security. The Office of the Assistant Secretary for Pension and Welfare Benefits is re-designated the Office of the Assistant Secretary for Employee Benefits Security, and

B. The Pension and Welfare Benefits Administration is re-designated as the Employee Benefits Security Administration.
C. All offices, subdivisions and positions within the Department of Labor deriving their names in whole, or in part, from the Office of the Assistant Secretary for Pension and Welfare Benefits or the Pension and Welfare Benefits Administration shall accomplish an appropriate change of name pursuant to this order.
D. All employees of the Office of the Assistant Secretary for Pension and Welfare Benefits and the Pension and Welfare Benefits Administration are re-designated employees of the Office of the Assistant Secretary for Employee Benefits Security or the Employee Benefits Security Administration, respectively.
E. All programs, activities, functions, and responsibilities delegated to the Office of the Assistant Secretary for Pension and Welfare Benefits or the Pension and Welfare Benefits Administration are re-designated programs, activities, functions and responsibilities of the Office of the Assistant Secretary for Employee Benefits Security or the Employee Benefits Security Administration, respectively.
F. All currently effective delegations made by the Assistant Secretary for Pension and Welfare Benefits to employees of the Pension and Welfare Benefits Administration are deemed delegations by the Assistant Secretary for Employee Benefits Security to employees of the Employee Benefits Security Administration.
G. Other agencies within the Department of Labor shall make any appropriate re-designation in conformity with the spirit and purpose of this order.

Delegation of Authority and Assignment of Responsibilities

H. Except as hereinafter provided, the Assistant Secretary for Employee Benefits Security is delegated the authority (including the authority to re-delegate) and assigned the responsibilities of the Secretary of Labor:
    1. under the following statutes, including any amendments:
        i. the Employee Retirement Income Security Act of 1974, as amended, except for subtitle C of Title III and Title IV (29 U.S.C. §§1001-1232);
        ii. the Welfare and Pension Plans Disclosure Act of 1958, as amended Pub. L. 85-836, 72 Stat. 997; Pub. Law 86-624, 74 Stat. 417; Pub. Law 87-420, 76 Stat. 35.
        iii. the Federal Employees' Retirement System Act of 1986 (5 U.S.C. §§8401-8479); and
        iv. as directed by the Secretary, such additional Federal acts similar to or related to those listed in paragraphs (i) through (iii), above, that from time to time may assign additional authority or responsibilities to the Secretary.
    2. to request information the Internal Revenue Service (IRS) possesses for use in connection with the administration of Title I of ERISA of 1974.
    3. to invoke all appropriate governmental privileges, arising from the functions of the Employee Benefits Security Administration, following his/her personal consideration of the matter and in accordance with the following guidelines:
        i. Generally Applicable Guidelines. The Assistant Secretary may not re-delegate the authority to invoke a privilege. The

privilege may be asserted only with respect to specifically described information and only where the Assistant Secretary determines the privilege is applicable. In asserting a privilege, the Assistant Secretary shall articulate in writing specific reasons for preserving the confidentiality of the information.

ii. Informant's Privilege (to protect from disclosure the identity of any person who has provided information to the Employee Benefits Security Administration in cases arising under the statutory provisions listed in paragraph 5.a.(1) of this order that are delegated or assigned to the Employee Benefits Security Administration). To assert this privilege, the Assistant Secretary must first determine that disclosure of the privileged matter may: (A) interfere with the Employee Benefits Security Administration's enforcement of a particular statute for which it exercises investigative or enforcement authority; (B) adversely affect persons who have provided information to the Employee Benefits Security Administration; or (C) deter other persons from reporting violations of the statute.

iii. Deliberative Process Privilege (to withhold information which may disclose pre-decisional intra-agency or inter-agency deliberations in cases arising under the statutory provisions listed in paragraph 5.a.(1) of this order including: the analysis and evaluation of facts; written summaries of factual evidence; and recommendations, opinions, or advice on legal or policy matters). To assert this privilege, the Assistant Secretary must [illegible] and does not concern recommendations that the department expressly adopted or incorporated by reference in its ultimate decision; (B) the information was generated prior to and in contemplation of a decision by a part of the Department; and (C) disclosure of the information would have an inhibiting effect on the Department's decision-making processes.

iv. Privilege for Investigative Files compiled for law enforcement purposes (to withhold information which may reveal the Employee Benefits Security Administration 's confidential investigative techniques and procedures). To assert this privilege, the Assistant Secretary must first determine that disclosure of the privileged matter may have an adverse impact upon the Employee Benefits Security Administration's enforcement of the statutory provisions listed in paragraph 5.a.(1) of this order, by: (A) disclosing investigative techniques and methodologies; (B) deterring persons from providing information to the Employee Benefits Security Administration; (C) prematurely revealing the facts of the Department's case; or (D) disclosing the identities of persons who have provided information under an express or implied promise of confidentiality.

v. Prior to filing a formal claim of privilege, the Assistant Secretary shall personally review the information sought to be withheld, including all the documents sought to be withheld (or, in cases where the volume of information is so large all of it cannot be personally reviewed in a reasonable time, an adequate and representative sample of such information) and a description or summary of the litigation in which the disclosure is sought.

vi. The Assistant Secretary may comply with any additional requirements imposed by local court rules or precedent in asserting a governmental privilege.

vii. In asserting a governmental privilege, the Assistant Secretary may ask the Solicitor of Labor or the Solicitor's representative to prepare and file any necessary legal papers or documents.

I. The Solicitor of Labor is responsible for providing legal advice and assistance to all officials of the Department relating to the administration of the statutes listed in paragraph 5.a.(1) of this order, for bringing appropriate legal actions on behalf of the Secretary, and representing the Secretary in all civil proceedings. The Solicitor of Labor is also authorized to request information the IRS possesses for use in connection with the administration of Title I of ERISA.

J. The Inspector General is authorized to request information the IRS possesses for use in connection with the administration of Title I of ERISA.

Reservation of Authority.

K. The submission of reports and recommendations to the President and the Congress concerning the administration of the statutes listed in paragraph 5.a.(1) of this order and responsibilities under Subtitle C of Title III of ERISA are reserved to the Secretary. The Pension Benefit Guaranty Corporation carries out responsibilities under Title IV of ERISA.

L. This Secretary's Order does not affect the authorities and responsibilities of the Office of Inspector General under the Inspector General Act of 1978, as amended, or under Secretary's Order 2-90 (January 31, 1990).

Effective Date. This order is effective upon the date of publication in the Federal Register.

II. Generally

Purpose

The Employee Retirement Income Security Act, at 29 U.S.C. §§ 1001 *et seq.* "is a remedial statute designed to protect the integrity of employee benefit plans maintained by employers." To that end, the Act contains extensive reporting and disclosure requirements. Penalties may be assessed for failure to comply with the Act's mandates. ***U.S. Dep't. of Labor (PWBA) v. Sociedad Para Asistencia Legal Money Purchase Plan***, 1994-RIS-62 (ALJ, Mar. 29, 1995).

In ***U.S. Dep't. of Labor (EBSA) v. Plan Administrator, Precision Wire Products, Inc.***, 2007-RIS-141 (ALJ, Sept. 10, 2008), the ALJ noted the following:

> Subsequent to passage of ERISA, Congress recognized that there was no separate penalty mechanism in the Act to enforce compliance with ERISA's

> annual reporting requirement with respect to plan administrators, and the options available under § 104(a)(5) were either impractical or insufficient. Accordingly, Congress added § 502(c)(2), 29 U.S.C. § 1132(c)(2), by means of § 9342(c)(2) of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203 ("OBRA"), for reports due after December 31, 1987 . . ..

Slip op. at 6. These provisions authorized the Secretary of Labor to assess a civil money penalty against a plan administrator of up to $1,100 a day from the date of the plan administrator's refusal or failure to file the annual report as required by Section 101(b)(4) of the Act.

To implement this congressional mandate, the Secretary of Labor promulgated 29 C.F.R. § 2560.502c-2, which sets forth procedures governing the assessment of civil penalties under Section 502(c)(2) of the Act.

III. Standard of Review

A. By the ALJ

In ***U.S. Dep't. of Labor (PWBA) v. Spalding and Evenflo Companies, Inc.***, 1992-RIS-19 (PWBA, Nov. 18, 1994), the Senior Policy Advisor cited to 29 C.F.R. § 18.43(b), which provides that the ALJ "shall have jurisdiction to decide all issues of fact and related issues of law," and he stated the following:

> [T]he ALJ has the power to try facts *de novo*. However, in deciding issues of law, the ALJ is bound by the governing statute and regulations, except to the extent he finds them to be invalid.

Id. at 8. Consequently, the Senior Policy Advisor determined that the ALJ could review the record *de novo* to determine the correct penalty amount to be assessed against Respondent. *See also* ***U.S. Dep't. of Labor (PWBA) v. Northwestern Institute of Psychiatry***, 1993-RIS-23 (PWBA, July 26, 1995) ("[t]he ALJ is not an appellate court, but rather functions in many ways as a court of original jurisdiction, hearing evidence").

In ***U.S. Dep't. of Labor (EBSA) v. Tile Finishers Local 88 NY, BAC Savings Plan***, Case No. 2008-RIS-20 (ALJ, June 3, 2008), the ALJ concluded that "[c]ompliance with the timeliness requirements of government regulations is generally not a jurisdictional matter" and a "failure to exhaust administrative remedies is not a jurisdictional matter in the context of administrative proceedings."

B. By the Senior Policy Advisor

In ***U.S. Dep't. of Labor (PWBA) v. Spalding and Evenflo Companies, Inc.***, 1992-RIS-19 (PWBA, Nov. 18, 1994), the Senior Policy Advisor for PWBA reviewed the ALJ's decision to determine whether it was supported by substantial evidence.

IV. Jurisdiction

A. Types of cases received by the OALJ

This Office receives two types of cases under the ERISA. First, administrative law judges determine the appropriateness of §§ 502(c)(2) and 502(c)(5) penalties imposed on administrators of employee benefit plans for failure to comply with these reporting and disclosure requirements of ERISA. Second, administrative law judges determine the penalties to be imposed under § 502(i) of ERISA for breach of fiduciary responsibilities.

B. Six year statute of limitations

Pursuant to 29 U.S.C. § 1113, a party has six years to file a claim against a fiduciary under ERISA for breach of a fiduciary duty.

1. Date on which limitations period commences

[a] Based on date of retirement

In ***Unisys Corp. Retiree Medical Benefit "ERISA" Litigation***, 242 F.3d 497 (3rd Cir. 2001), the court addressed the issue of when the "date of the last action" constituting the breach occurred. The court noted that this date, in turn, determines the date on which the limitations period begins to run. The retirees maintained that the last action constituting part of the breach occurred when Unisys terminated the lifetime plans. However, the court disagreed and held that:

> . . . insofar as decisions to retire are concerned, a retiree's date of retirement is necessarily the last date upon which Unisys could have made a relevant misrepresentation or upon which a clarifying communication could have prevented detrimental reliance.

Thus, the court concluded that the limitation of action period would properly run from the date of retirement for each employee. In this vein, summary judgment for Unisys was upheld with respect to the employees who asserted claims based on retirement decisions made more than six years before the suit was filed.

[b] For failure to comply with disclosure and reporting requirements

In ***Warzecha v. The Nutmeg Companies, Inc.***, 48 F. Supp.2d 151 (D. Conn. 1999), plan participants brought an action against the plan administrator and trustees for alleged violations of ERISA. Citing to 29 U.S.C. § 1113 of the Act, Defendants argued that the action was time-barred because it was filed more than six years after the "accrual date." Initially, Plaintiffs argued that Defendants breached ERISA's disclosure and reporting requirements by failing to furnish Plaintiffs with summary plan descriptions for the 1989 and 1992 plan years as required by 29 U.S.C. §§ 1021(a), 1022(a)(1), and 1024(b). The court found, however, that Plaintiff's action with regard to the 1989 plan year was time-barred as Plaintiff's filed suit more than six years after the plan descriptions were required to be distributed under the statute. On the other hand, the count based on the 1992 plan was not time-barred. Similarly, with regard to the publication of annual reports as required by 29 U.S.C. § 1023, the report pertaining to the 1989 plan was time-barred, but the count related to the 1992 plan report was timely.

In ***Northwestern Institute of Psychiatry v. Martin***, 1993 WL 52553 (E.D. Pa., Feb. 24, 1993), Plaintiff, a plan administrator, sought relief from an $86,500 penalty assessed against it. PWBA assessed the penalty against Plaintiff based on Plaintiff's failure to comply with the Act's reporting requirements, including a failure to submit "statutorily required separate schedules covering plan assets held for investment and reportable transactions" as well as the Independent Qualified Public Accountant Report (IQPA). It was then noted that Plaintiff failed to file a "statement of reasonable cause" within 30 days of the deficiency and penalty assessment notice. Moreover, the statement was to be accompanied by a declaration indicating that the statement was made under penalty of perjury as required by 29 C.F.R. § 2560.502c-2(e).

PWBA cited to 29 C.F.R. § 2560.502c-2 to argue that Plaintiff's failure to file a timely response constituted its acceptance of the facts alleged and a waiver of a right to appear and contest the facts contained in the notice. Plaintiff maintains, on the other hand, that PWBA abused its discretion in applying the regulations and improperly deprived it of a hearing. The court noted that, based on additional submissions by Plaintiff, PWBA subsequently concluded that Plaintiff complied with the Act's reporting requirements. The court held the following:

> Plaintiff, by timely filing a reasonable cause statement, believed it was securing the right for administrative review of Defendant's ensuing determination. Plaintiff should have been afforded the opportunity to correct or amend its reasonable cause statement. Under concepts of due process and fairness, Defendants must render a Determination and allow Plaintiff access to administrative review. As a matter of law, this Court concludes that the Secretary's application or interpretation of 29 C.F.R. § 2560.502c-2(e) and (f) was arbitrary, capricious, and an abuse of discretion and lacked a rational basis.

The court concluded that the failure to file a statement of reasonable cause and a failure to file a declaration with the statement are two separate matters. The later circumstance should not operate to preclude administrative review.

[c] For breach of fiduciary duty

In ***Warzecha v. The Nutmeg Companies, Inc.***, 48 F. Supp.2d 151 (D. Conn. 1999), Plaintiffs alleged that Defendants breached their fiduciary duties in failing to make required contributions to the pension funds and in failing to advise Plaintiffs of this failure. The court stated that "[f]or purposes of Defendants' summary judgment motion, all parties agree that Plaintiffs were not aware of a possible problem with how Defendants calculated the contributions to Plaintiff's pension plans until October 1994" when the company held a meeting with its employees to explain contributions to the Nutmeg Plan. Since the civil action was brought in 1997, it was not time-barred.

2. Fraud or concealment tolls the statute of limitations period

In ***Unisys Corp. Retiree Medical Benefit "ERISA" Litigation***, 242 F.3d 497 (3rd Cir. 2001), retirees filed a class action against their former employer, Unisys, for termination of post-retirement medical plans. Unisys argued that the action was barred by the six year statute of limitations contained at 29 U.S.C. § 1113 for an alleged breach of fiduciary duty. The retirees maintained that Unisys benefits counselors erroneously advised them that they were entitled to lifetime medical benefits. The retirees assert that the counselors failed to also advise them that the company's summary plan descriptions contained a "reservation of rights" clause permitting the company to terminate the plan at any time for any reason. As a result, the retirees argue that the statute of limitations period was tolled because of the employer's "fraud" or "concealment." The circuit court held, however, that the "fraud or concealment" provision at § 1113(2) was inapplicable:

> [I]f all that a plaintiff can show is that a counselor represented to him that he had guaranteed lifetime health care benefits or failed to give him accurate advice knowing that he believed he had such benefits, the fraud or concealment clause is inapplicable. In such cases, Unisys cannot be said to have taken affirmative steps, either as part of the original breach of duty or thereafter, to cover up its breach. To the contrary, pursuant to the relevant provisions of ERISA, Unisys regularly distributed to its employees and retirees SPDs unambiguously explaining that the plan provisions calling for lifetime benefits could be amended at any time for any reason.

The court further refused to apply the doctrine of equitable tolling to prevent the running of the statute of limitations. It stated that "superimposing . . . equitable tolling rules" on the limitations period contained at § 1113 would not be consistent with congressional intent or Supreme Court mandate. *See also* **Caputo v. Pfizer, Inc.**, 267 F.3d 181 (2nd Cir. 2001) (the six year statute of limitations must be tolled in cases in which the fiduciary (1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment, or (2) engaged in acts to hinder the discovery of a breach of fiduciary duty).

V. Evidence

A. Breach of fiduciary duty–burden of proof
Secretary's burden to establish breach of fiduciary duty

In ***Rodrigues v. Herman***, 121 F.3d 1352 (9th Cir. 1997), the Secretary alleged that Rodrigues engaged in prohibited transactions in violation of ERISA by investing plan money in a partnership in which the plan had no legal interest, but Rodrigues did have an interest. A settlement resulting in a consent decree was approved by the ALJ. In the consent decree, Rodrigues did not admit any wrongdoing. However, the Secretary also reserved the right to assess a civil money penalty under § 502(l) of ERISA based on amounts recovered through the settlement which were actually paid by the plan to the partnership in violation of ERISA. The Secretary subsequently assessed a penalty against Rodrigues in the amount of $32,999.80 and denied his request for a waiver of the penalty. Rodrigues sought relief in district court alleging that the Secretary exceeded her statutory authority in assessing the penalty.

The circuit court affirmed the district court's finding of summary judgment in favor of the Secretary. Initially, the court noted that it is the Secretary's burden to establish that a breach of fiduciary duty occurred. Under the terms of the settlement, Rodrigues admitted no wrongdoing and the court disagreed with the Secretary's position that she "need not prove that there has been a breach when (she) has secured a settlement agreement with a party." The court reasoned that there may be a situation where no breach occurred but the "fiduciary agreed to a settlement to avoid an expensive legal battle." However, the court concluded that, based on the record before it, there was a fiduciary breach as a matter of law. In particular, the court viewed the facts in a light most favorable to Rodrigues and noted that it was clear that Rodrigues "breached a common law trust duty to keep trust property separate and clearly designate such property as property of the trust." The court concluded that, "[b]y failing to abide by such a fundamental trust law duty, Rodrigues failed to exercise care and diligence of 'a prudent man acting in a like capacity and familiar with such matters.'" (citing to 29 U.S.C. § 1104(a)(1)(B)).

B. Failure to comply with disclosure and reporting requirements– burden of proof Respondent's burden to establish "good faith" efforts to comply

[*see* Chapter XI for additional cases on "reasonable cause," "good faith," and "diligence"]

In ***U.S. Dep't. of Labor (PWBA) v. Spalding and Evenflo Companies, Inc.***, 1992-RIS-19 (PWBA, Nov. 18, 1994), the ALJ approved of the assessment of civil money penalties against Spalding for its failure to timely submit independent qualified public accountant (IQPA)reports for each of its three welfare plans. The Senior Policy Advisor for PWBA held that "[t]he burden, under the regulations, is not that the ALJ find that Spalding did not proceed in good faith to comply, but rather that Spalding must demonstrate, to the satisfaction of the ALJ, that it proceeded in good faith to comply." More specifically, the Senior Policy Advisor stated that "the issue before the ALJ was whether Spalding, having been found to have filed a materially deficient statement, demonstrated to the ALJ that it demonstrated good faith and diligence in coming into compliance with ERISA's audit requirements." The Senior Policy Advisor reiterated that the "burden of accurate and complete reporting and disclosure is on ERISA plan administrators and fiduciaries, who must meet the requirements of the statute and regulations thereunder."

VI. Discovery

Admission based on failure to respond to "Notice of Intent"

In ***U.S. Dep't. of Labor v. Optical Corp. of America***, 1999-RIS-60 (ALJ, Nov. 23, 1999), the ALJ ordered that the administrative proceeding be dismissed on grounds that Respondent was not entitled to a hearing pursuant to 29 C.F.R. § 2560.502c-2(f) because Respondent failed to file "a statement of reasonable cause following a Notice of Intent to Assess a Penalty." It was determined that Respondent's failure to file the statement constituted a waiver of the right to a hearing and an admission of the facts alleged in the Notice of Intent.

VII. Filing Requirements

Generally

The Department of Labor requires that the plan administrator file a comprehensive set of reports and forms which contain the following information: (1) a plan description and summary plan description; (2) a statement of any material modification in the terms of the plan or any change in the information included in the plan description; (3) terminal and supplementary reports; (4) an annual report (Form 5500); (5) a notice of any plan amendment that may retroactively reduce accrued benefits; and (6) upon request of the Department, any documents relating to the plan, including the bargaining agreement, trust agreement, contract, or any other document or contract under which the plan is established or operated. 29 U.S.C. §§ 1021-1024 and 1082(c)(8).

Pursuant to 29 U.S.C. § 1132(c), the Secretary of Labor may assess a civil money penalty against any plan administrator "of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report . . .." 29 U.S.C. § 1132(c). *See also* 29 C.F.R. § 2560.502c-2. If the employee benefit plan covers 100 or more participants, then the annual report must also include a report of an independent qualified public accountant (IQPA). 29 U.S.C. § 1132(c)(2); 29 C.F.R. § 2520.103-1(b)(5).

VIII. Prohibited Transactions

Generally

The provisions of 29 U.S.C. § 1132(i) address the penalties which may be assessed for "prohibited transactions" and the statute provides as follows:

> In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of title 26) for each year or part

> thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26.

29 U.S.C. § 1132(i). *See also* 29 C.F.R. § 2560.502i-1. The "amount involved" is defined at 29 C.F.R. § 2560.502i-1(b) as follows:

> (b) *Amount involved.* Section 502(i) of ERISA states that the term 'amount involved' in that section shall be defined as it is defined under section 4975(f)(4) of the Code. As provided in 26 C.F.R. § 141.4975.13, 26 C.F.R. § 53.4941(e)-1(b) is controlling with respect to the interpretation of the term 'amount involved' under section 4975 of the Code. Accordingly, the Department of Labor will apply the principles set out at 26 C.F.R. § 53.4941(e)-1(b) in determining the 'amount involved' under in a transaction subject to the civil penalty provided by section 502(i) of the Act and this section.

29 C.F.R. § 2560.502i-1.

In ***Rodrigues v. Herman***, 121 F.3d 1352 (9th Cir. 1997), the Secretary alleged that Rodrigues engaged in prohibited transactions in violation of ERISA by investing plan money in a partnership in which the plan had no legal interest, but Rodrigues did have an interest. A settlement resulting in a consent decree was approved by the ALJ. In the consent decree, Rodrigues did not admit any wrongdoing. However, the Secretary also reserved the right to assess a civil money penalty under § 502(l) of ERISA based on amounts recovered through the settlement which were actually paid by the plan to the partnership in violation of ERISA.

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Initially, the court noted that it is the Secretary's burden to establish that a breach of fiduciary duty occurred. Under the terms of the settlement, Rodrigues admitted no wrongdoing and the court disagreed with the Secretary's position that she "need not prove that there has been a breach when (she) has secured a settlement agreement with a party." The court reasoned that there may be a situation where no breach occurred but the "fiduciary agreed to a settlement to avoid an expensive legal battle." However, the court concluded that, based on the record before it, there was a fiduciary breach as a matter of law. In particular, the court viewed the facts in a light most favorable to Rodrigues and noted that it was clear that Rodrigues "breached a common law trust duty to keep trust property separate and clearly designate such property as property of the trust." The court concluded that, "[b]y failing to abide by such a fundamental trust law duty, Rodrigues failed to exercise care and diligence of 'a prudent man acting in a like capacity and familiar with such matters.'" (citing to 29 U.S.C. § 1104(a)(1)(B)).

IX. Breach of fiduciary duty

Generally

The Act provides that civil money penalties may be assessed against any plan fiduciary for a breach of fiduciary duty. The provisions at 29 U.S.C. § 1132(l) state the following:

> (1) In the case of–
>
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or
>
> (B) any knowing participation in such a breach or violation by any other person,
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
>
> (2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--
>
> (A) pursuant to any settlement agreement with the Secretary, or
>
> (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) and (a)(5) of this section.
>
> (3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that–
>
> (A) the fiduciary or other person acted reasonably and in good faith, or
>
> (B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.
>
> (4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall b reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

29 U.S.C. § 1132.

X. Preemption of State Law

A. Preemption established

In ***Egelhoff v. Egelhoff***, 121 S.Ct. 1322 (2001), the Supreme Court held that ERISA preempted a state statute, which provided for automatic revocation of the designation of a divorced spouse as the beneficiary of a non-probate asset. The Court concluded, to the contrary, that the state law was in direct conflict with ERISA requirements that the plan be administered, and benefits paid, in accordance with plan documents. The preemptions provisions at 29 U.S.C. § 1144(a) provide that ERISA "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. Citing to ***Shaw v. Delta Air Lines, Inc.***, 463 U.S. 85, 97 (1983), the court reiterated that a state law relates to an ERISA plan "if it has a connection with or reference to such a plan." The Court stated that it must be determined whether the scope of the state law interferes with the objectives of the ERISA. Under the facts before it, the Court held that:

> The (state) statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status. The administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. The statute thus implicates an area of core ERISA concern.

The Court cited to 29 U.S.C. §§ 1102(b)(4), 1102(8), and 1104(a)(1)(D) to state that ERISA directly addresses beneficiary payments. The Court concluded, therefore, that the state statute improperly interfered "with nationally uniform plan administration." *See also* ***Bullock v. Equitable Life Assurance Society of the United States***, 259 F.3d 395 (5^{th} Cir. 2001) (preemption found where state statute addresses an area of exclusive federal concern and it directly affects the relationship among traditional ERISA entities, *i.e.* the employer, plan administrators, fiduciaries, participants, and beneficiaries).

B. Preemption not established

In ***Boyle, et al. v. Anderson, et al.***, 1994 U.S. Dist. LEXIS 4931, Case No. 3-93-359 (D. Minn., Apr. 12, 1994), plan trustees argued that ERISA preempted the state's collection and reporting requirements as well as its spending caps and two percent provider tax "insofar as that tax is passed on to health benefit plans covered by" ERISA.[1] The court concluded that Plaintiff did not have standing to challenge the state's reporting and spending cap requirements. It further held that the provider tax portions of the state statute were not pre-empted by ERISA. With regard to a lack of standing, the court noted that "Plaintiffs have failed to show that they are in any way injured by the reporting requirements of (the state), which do not apply to these Plaintiffs." The same was true of Plaintiffs' challenge to the state's spending cap provisions–Plaintiffs did not have standing to challenge the cap because the provisions did not apply to them. With regard to the provider tax, Plaintiffs established standing to sue and argued that the provider tax was preempted by ERISA insofar at the tax was passed through to the plans. Citing to ***Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp., Inc.***, 947 F.2d 1341, 1344-45 (8^{th} Cir. 1991), the court set forth seven factors to be considered in determining whether a state statute of general application is preempted by ERISA:

> (1) whether the state law negates a provision of an ERISA plan; (2) whether the state law affects regulations between primary ERISA entities; (3) whether the state law has an impact on the structure of ERISA plans; (4) whether the state law has an impact on the administration of ERISA plans; (5) whether the state law has an economic impact on ERISA plans; (6) whether preemption of the state law is consistent with other ERISA provisions; and (7) whether the state law is an exercise of traditional state power.

Initially, the court noted that a statute is of "general application" when it "does not treat ERISA plans differently from non-ERISA plans." It found that the state statute at issue, by its language, applied to all health care providers, "and the passthrough of the tax potentially affects all third-party purchasers." As a result, the court concluded that the statute was of general application and the factors set forth in ***Arkansas Blue Cross*** were applicable. In this vein, Plaintiffs argued that the state statute "increase(d) costs to employee benefit plans in order to provide benefits to uninsured individuals who are not beneficiaries of the plans and, thus, violates the "'exclusive benefits' provision of ERISA."

The court disagreed to find that states often exercise police power which, in turn, will increase the cost of doing business in the state and the beneficiaries of the state regulations are not necessarily those persons who pay the increased costs. The court concluded that Congress did not intend for ERISA to be interpreted so broadly that it would preempt state policing regulation. Under the particular facts before it, the court determined that the "provider tax does not negate a plan provision or conflict with other ERISA statutory provisions." The court then addressed the effect of the state statute on ERISA entities and the plan structure and noted that:

> If the state law alters the relationships among the primary ERISA entities–the employer, the plan, the plan fiduciaries, and the beneficiaries–and thereby alters the structure of the plan, this factor weighs in favor of preemption.

Plaintiffs maintained that persons who are not plan beneficiaries nevertheless received benefits from the plan through the provider tax such that they were "effectively added as new beneficiaries to the plans," thus altering the plans. The court resolved, to the contrary, that this argument would lead to the impermissible and overstated conclusion that every state law resulting in any increased plan costs such as a sales tax, environmental regulations, or minimum wage laws, are preempted by ERISA.

The court concluded that, because the state's provider tax did not have a "significant effect on primary ERISA entities," this element did not support preemption. The court then looked to whether the provider tax imposed an administrative burden and concluded that it did not. The court stated that there was no significant intrastate administrative impact as plan administrators did not have "to consider claims on an individual basis to determine the proper payee." Moreover, the court determined that the provider tax did not affect interstate administration. It noted that, through discovery, Plaintiffs admitted that their plans were "equipped to accommodate differences in costs for similar procedures" and that "the amounts they pay for similar services at different locations can vary by more than two percent." The court held that the provider tax, which is passed through to the plans, does not support preemption because it does not impose "significant" additional interstate or intrastate administrative difficulties in the operation of ERISA plans.

The court then considered the "economic impact" factor in assessing whether the state statute was preempted. Initially, it noted that the circuit courts are divided with regard to the importance of economic impact as a factor in determining preemption under ERISA. The Second and Fifth Circuits have held that it is a significant factor, ***E-Systems, Inc. v. Pogue***, 929 F.2d 1100 (5th Cir. 1991) and ***The Travelers Ins. Co. v. Cuomo***, 14 F.3d 708, 721 (2nd Cir. 1993), whereas the Third Circuit has held that economic impact alone is insufficient to support preemption. ***United Wire, Metal & Machine Health and Welfare Fund v. Morristown Memorial Hosp.***, 995 F.2d 1179 (3rd Cir.), *cert. denied*, 114 S. Ct. 382 (1993). The court found that any economic impact imposed by the provider tax was minimal. In particular, it did not involve "direct taxation or services offered by ERISA plans." The court concluded that the impact of the tax on ERISA plans was "tenuous, remote, and peripheral", which did not support a finding of preemption.

With regard to the final factor to be considered, the court concluded that the state provider tax statute constituted an exercise of traditional state power. Specifically, the court found that it was long-recognized that a state's inherent police powers included regulating health care. Consequently, the court determined that the state provider tax was not preempted by ERISA on this ground.

Common law breach of contract claim not preempted

In ***Warzecha v. The Nutmeg Companies, Inc.***, 48 F. Supp.2d 151 (D. Conn. 1999), Plaintiffs argued that Defendants violated state laws in failing to contribute to Plaintiff's pension plans and in failing to pay agreed compensation to Plaintiffs. The court concluded that all but one of the state claims was time-barred. With regard to the viable state claim, the court analyzed whether it was preempted by ERISA and concluded that it was not. Initially, the court stated:

> [W]e first consider whether Plaintiffs' breach of contract claim depends upon the existence of an ERISA plan to show liability, such that the merits of Plaintiffs' common-law claims are contingent upon the rights conferred by the ERISA plan. We also consider whether Plaintiffs' breach of contract claim has a 'clear connection with a plan by mandating employee benefit structures and administration or by providing alternative enforcement mechanisms.' (citations omitted).

Id. at 160. Upon review of the parties' arguments, the court noted that the focus of Plaintiffs' arguments was that "Defendants did not pay them wages or reimburse them for gasoline credit card charges according to the terms of an oral or implied employment contract." The court found, therefore, that this cause of action could be brought regardless of the existence of the ERISA plan. Moreover, the court noted that:

> . . . although Plaintiffs' breach of contract claim refers to the Defendants' misuse of Nutmeg Plan funds (by effectively shifting funds from the Plaintiffs' pension plans to cover excess weekly wages and reimbursements for the gasoline credit card charges), the Plaintiffs' breach of contract claim does not attempt to restructure employee benefits, affect the Nutmeg Plan's administration, or create an alternative enforcement mechanism.

As a result, the court held that the common law breach of contract claim was not preempted by ERISA.

XI. Relief

A. Assessment of civil money penalty

1. Failure to file independent qualified public accountant report (IQPA)

In ***U.S. Dep't. of Labor (EBSA) v. Dynapace Corp.***, 2005-RIS-88 (ALJ, Jan. 10, 2007), the ALJ upheld a penalty assessment of $86,500.00 where Respondent failed to file the required IQPA along with a schedule of assets held for investment. Although Respondent argued that it had fewer than "40 active employees" due to layoffs, the ALJ noted that "the plan's participant count 'exceeded 100' when the accounts of active participants and those participants terminated from the company were added together." The ALJ noted that Respondent could not utilize the simplified annual reporting procedures because it had more than 100 participants at the "*beginning of the plan year*" (emphasis in original). From this, it was determined that the IQPA should have been filed. Because the plan administrator did not demonstrate "good faith" or "diligence" in complying with ERISA's requirements, the penalty amount of $86,500.00 would not be waived. *See also* ***U.S. Dep't. of Labor (EBSA) v. Tile Finishers Local 88 NY, BAC Savings Plan***, 2208-RIS-20 (ALJ, June 3, 2008) (EBSA's assessment of $5,000.00 was proper on grounds that IQPA report was filed 530 days after the initial due date and EBSA demonstrated "scrupulous compliance with the regulatory requirements for imposition of a penalty"); ***U.S. Dep't. of Labor (EBSA) v. Product Mgt., Inc.***, 2007-RIS-113 (ALJ, Feb. 23, 2009) ($50,000 penalty for failure to file IQPA report affirmed where plan administrator received multiple notices about requirements for IQPA, but failed to comply); ***U.S. Dep't. of Labor (EBSA) v. Tile Finishers Local 88 NY, BAC Savings Plan***, 2008-RIS-20 (ALJ, June 3, 2008) ($5,000 penalty for failure to file a timely IQPA report affirmed); ***U.S. Dep't. of Labor (EBSA) v. Plan Administrator Arsenson Office Furnishings, Inc. p/s 401(K) Plan***, 2007-RIS-111 (ALJ, May 2, 2008) (EBSA's assessment of $2,500 penalty for failure to timely file a IQPA report, which was abated by 95% of the original penalty assessed, was affirmed; the assessment was not arbitrary, capricious, or unreasonable); ***U.S. Dep't. of Labor (EBSA) v. New Design Construction Co.***, 2007-RIS-9 (ALJ, May 4, 2007) (affirming assessment of $5,545 for failure to file a timely IQPA report).

In ***U.S. Dep't. of Labor (EBSA) v. Callaghan & Callaghan, Inc.,*** 2005-RIS-99 (ALJ, Apr. 24, 2006), the ALJ affirmed the assessment of a $2,167.00 penalty by the Employee Benefit Security Administration (EBSA) against Respondent for failure to timely file its IQPA. Initially, the ALJ noted that a penalty assessed by the EBSA will generally not be disallowed by a judge, unless the judge finds that EBSA "has acted in an arbitrary, capricious, or unreasonable manner." The ALJ determined that EBSA did not act in an arbitrary, capricious, or unreasonable manner. EBSA initially proposed to assess a penalty of $43,350.00 against Respondent based on calculations supported by the regulations but, upon request by Respondent for a waiver of the penalty for reasonable cause (*i.e.* it took corrective action and filed its IQPA), EBSA reduced the proposed penalty by 95 percent to $2,167.00. EBSA explained that the remaining penalty amount was proper because Respondent failed to originally file an acceptable annual report, or to timely correct deficiencies in the originally filed report. Notably, the ALJ found that internal miscommunications between the Respondent and its accountant as well as alleged erroneous advice from an "unidentified EBSA employee", resulting in the IQPA not being timely filed, did not give rise to a finding that EBSA's assessment was improper; rather, the ALJ noted that ERISA "places responsibility for accurate, complete, and timely reporting on the plan administrator" and Respondent's "failure to take steps to ensure that the IQPA was properly filed does not demonstrate good faith or diligence in the performance of its responsibilities as a plan administrator."

In ***U.S. Dep't. of Labor (PWBA) v. Schneiderman's Furniture, Inc.***, 2000-RIS-40 (ALJ, Mar. 23, 2001), the ALJ concluded that the penalty assessed against Respondent in the amount of $2,500.00 was proper. She noted that the original penalty assessment of $50,000.00 was reduced by 95 percent to account for Respondent's compliance. However, it was determined that the remainder of the penalty amount totaling $2,500.00 was supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion. In particular, the ALJ noted that Respondent failed to timely file the required independent qualified public accountant report within the 45 day time period which PWBA allowed for Respondent to come into compliance. Rather, Respondent did not comply fully for an additional two and one-half months.

In ***U.S. Dep't. of Labor (PWBA) v. Compgraphix, Inc.***, 1999-RIS-53 (ALJ, Oct. 14, 1999), the ALJ upheld PWBA's assessment of a $50,000 penalty against Respondent for failure to include the report of an independent qualified public accountant (IQPA) as required by ERISA at 29 U.S.C. § 1023(a)(3)(A). Respondent argued that it had established reasonable cause for failure to file the IQPA report:

> Comgraphix notes that the auditor's fee is a plan expense payable out of plan assets and Comgraphix's exhibits demonstrate that the plan had no assets with which to pay for the audit, making it impossible for Comgraphix to file the 1996 IQPA report for Plan 001.

The ALJ found, however, that $13,853 of the plan's assets were in interest-bearing cash such that it could have afforded the audit and the fact that the plan "had assets available at the end of 1996 but soon thereafter did not have sufficient assets to pay of an audit underscores the importance of ERISA's reporting and disclosure provisions." The ALJ further stated that, without the independent audit, it could not be determined whether there were fiduciary breaches in the plan's administration. As a result, the $50,000 penalty was upheld.

2. Engaging in prohibited transactions

In ***Rodrigues v. Herman***, 121 F.3d 1352 (9th Cir. 1997), the Secretary alleged that Rodrigues engaged in prohibited transactions in violation of ERISA by investing plan money in a partnership in which the plan had no legal interest, but Rodrigues did have an interest. The court concluded that, based on the record before it, there was a fiduciary breach as a matter of law. In particular, the court noted that it was clear that Rodrigues "breached a common law trust duty to keep trust property separate and clearly designate such property as property of the trust." The court concluded that, "[b]y failing to abide by such a fundamental trust law duty, Rodrigues failed to exercise care and diligence of 'a prudent man acting in a like capacity and familiar with such matters.'" (citing to 29 U.S.C. § 1104(a)(1)(B)). Having determined that a breach of fiduciary duty was established, the court then sought to define "applicable recovery amount" under § 502(l) for purposes of assessing a civil money penalty. Citing to ***Mertens v. Hewitt Assoc.***, 508 U.S. 248, 259-61 (1993), the court upheld the penalty assessment despite Rodrigues' argument that he did not "pay the Plans out-of-pocket" and, thus, "there was 'no recovery' as a matter of law." It was noted that the ***Mertens*** Court held that equitable transfers of assets and property may constitute an "applicable recovery amount" even in the absence of a monetary damage award. Here, Rodrigues assigned a ten percent in the partnership to the Plans according to the settlement agreement. As a result, the § 502(l) penalty was properly assessed on this amount.

3. Failure to comply with terms of settlement agreement

In ***U.S. Dep't. of Labor (PWBA) v. Current Development Corp.***, 1996-RIS-67 (ALJ, Feb. 22, 2000), the ALJ was confronted with PWBA's allegations that Respondent failed to abide by the terms of a settlement agreement. In particular, Complainant alleged that Respondent failed to pay the penalty as required by the agreement and it failed to timely file a Form 5500 C/Rs and participant beneficiary statements. The ALJ noted that the agreement specifically provided that he would retain jurisdiction until compliance with the agreement was accomplished. The ALJ determined that Respondent's failure to fulfill the terms of the agreement returned the parties to the *status quo ante*, *i.e.* the positions of the parties as they existed prior to execution of the agreement).

Testimony revealed that the Form 5500 C/Rs was not timely filed because the company president "never took the time to manually take the information from the work papers, put it on statements and get it out." The ALJ concluded that this reason did not excuse compliance with the agreement. The ALJ upheld the imposition of a $198,000 fine by the Administrator as within his authority to impose pursuant to 29 C.F.R. § 2560.502c-2. Moreover, he concluded that the $15,000 penalty negotiated in the agreement was reasonable. By *errata* dated March 2, 2000, the ALJ corrected certain monetary calculations in his February 2000 decision. The revised order directed payment of a total penalty of $38,062.00 within 30 days, which comprised one percent of the total penalty amount of $2,096,200.00, plus certain late charges. The ALJ further concluded that, if payment was not timely made, then Respondent would be required to pay a total of $2,311,300.00 in penalties and sanctions.

B. Date of commencement of penalty

In ***U.S. Dep't. of Labor (PWBA) v. Spalding and Evenflo Companies, Inc.***, 1992-RIS-19 (PWBA, Nov. 18, 1994), Spalding failed to timely submit independent qualified public accountant reports for each of its three welfare plans. The Senior Policy Advisor noted that "[t]he regulations define the date on which the administrator failed or refused to file as the 'date on which the annual report was due (determined without regard to any extension for filing).'" Under the facts of the case before him, the Senior Policy Advisor stated that calculation of the penalty must begin on August 1, 1989, "the day after the original July 31, 1989 filing deadline for the Forms 5500s." He noted that "[t]he regulations do not provide for deviations from this starting date for penalty calculations" except that they do provide for "a tolling of time for calculating penalty amounts in situations in which the plan administrator files a statement of reasonable cause . . .." As a result, the Senior Policy Advisor held that the ALJ erred in calculating the penalty amount from the date on which PWBA first notified Spalding that its reports were deficient. The Senior Policy Advisor reiterated that the "burden of accurate and complete reporting and disclosure is on ERISA plan administrators and fiduciaries, who must meet the requirements of the statute and regulations thereunder" and, therefore, "[t]he date for complying with the annual reporting requirements is the date that the annual report is due, not the date on which a PWBA reviewer first notes a failure or deficiency." He further stated that allowing a plan administrator to violate the disclosure requirements without penalty until PWBA notifies him of the violation improperly shifts the burden "of compliance from the plan administrator to the supervising agency", which is "not only insupportable as a matter of law but illogical as a matter of fundamental policy."

C. Grounds for waiver of Section 502(c) penalty; "reasonable cause"

1. Established

[no cases to report at this time]

2. Not established

[a] Bankruptcy, consolidation, departure of officers

In ***U.S. Dep't. of Labor (EBSA) v. Synergy Mfg. Technology, Inc.***, Case No. 2005-RIS-20 (ALJ, Feb. 21, 2007), Respondent argued that reasonable cause existed for reduction or abatement of a $50,000 penalty assessed for failure to file a IQPA report for the 2002 plan year. Specifically, the company stated that "consolidation of the company's subsidiary locations caused year 2002 records to be unavailable" and that it had requested the records from its bank and payroll service. In a subsequent pleading, Respondent elaborated to state that it had filed for bankruptcy and closed several locations. Moreover, during the time period in question, the company's chief financial officer died and the comptroller from one of the branches left the company and was "not helpful" in obtaining the records.

The ALJ concluded that the proffered circumstances did not constitute "reasonable cause" and stated:

> [Respondent's] attempt to pin the company's failure to timely file the IQPA report on the tail of a deceased corporate officer or a departed comptroller would not demonstrate good faith or diligence in Respondent's performance of its duties as plan administrator. Nor would these factors present reasonable cause for the more than 16-month delay in filing the IQPA report. Further, Synergy's misunderstanding concerning the due date for the annual report does not render its amended report timely filed.

Slip op. at 8.

[b] Plan participants totaled 100 at beginning of plan year

In ***U.S. Dep't. of Labor (EBSA) v. Dynapace Corp.***, 2005-RIS-88 (ALJ, Jan. 10, 2007), the ALJ upheld a penalty assessment of $86,500.00 where Respondent failed to file the required IQPA along with a schedule of assets held for investment. Although Respondent argued that it had fewer than "40 active employees" due to layoffs, the ALJ noted that "the plan's participant count 'exceeded 100' when the accounts of active participants and those participants terminated from the company were added together." The ALJ noted that Respondent could not utilize the simplified annual reporting procedures because it had more than 100 participants at the "*beginning of the plan year*" (emphasis in original). From this, it was determined that the IQPA should have been filed. Because the plan administrator did not demonstrate "good faith" or "diligence" in complying with ERISA's requirements, the penalty amount of $86,500.00 would not be waived. *See also* ***U.S. Dep't. of Labor (EBSA) v. Plan Administrator, Stover Industries, Inc.***, 2006-RIS-7 (ALJ, Mar. 15, 2007) (penalty of $44,400.00 assess for failure to file IQPA).

[c] Plan terminated

In ***U.S. Dep't. of Labor v. Compgraphix***, Case No. 1999-RIS-53 (ALJ, Oct. 14, 1999), the plan administrator declined to file an annual report on grounds that the plan had been terminated and there were no funds to pay for an audit. Moreover, the plan administrator asserted that it relied on erroneous legal advice that, under its circumstances, an annual report could be filed without an accompanying audit report. The ALJ noted that, under the regulations, "the Department anticipates that [ERISA section] 502(c) penalties will be waived to the extent that reasonable cause is demonstrated by the plan administrator." 54 Fed. Reg. 26892 (1989). Although "reasonable cause" is not defined in the regulations, the ALJ noted that the regulations offer sufficient flexibility "to ensure that appropriate consideration is given to good faith and diligent efforts by the administrator to comply with the annual reporting requirement." As a result, the ALJ noted that the civil money penalty under Section 502(c)(2) is determined by "taking into consideration the degree of willfulness of the failure to file the annual report." 29 C.F.R. § 2560.502c-2(b)(1).

The ALJ rejected Compgraphix's reliance on erroneous legal advise for three reasons: (1) the advice was "at best secondhand" as there was no evidence that the plan administrator sought the legal advice directly; (2) even if the advice was given directly to the plan administrator, it was not excused from the "attorney's nonfeasance or negligence"; and (3) the plan administrator was advised by the Department that the IQPA (audit report) was required. The ALJ stated:

> To date, despite being advised that the IQPA report was required, Compgraphix has not filed the IQPA report not is there any evidence the Compgraphix has made any attempt to comply. Considering the extraordinary length of time that has transpired since PWBA advised Compgraphix that the IQPA report was required, I can give little weight to any argument that any part of the penalty should be waived because Compgraphix relied on incorrect legal advice.

Further, the ALJ noted that, during the year that the plan administrator was required to obtain and file an IQPA, there were sufficient assets in the plan to cover the costs. Therefore, the ALJ found the plan administrator's argument that there were no funds to pay for an audit unpersuasive. Indeed, the ALJ reasoned that "[t]he fact that Plan 001 had assets available at the end of 1996 but soon thereafter did not have sufficient assets to pay for an audit underscores the importance of ERISA's reporting and disclosure provisions."

Because the plan administrator failed to file the required IQPA report and did not demonstrate "reasonable cause" to modify the $50,000 civil money penalty assessed by the PWBA, the ALJ upheld the assessment on summary judgment. In its request for summary decision, the PWBA also requested that the corporate veil be pierced and liability for the civil money penalty be imposed on the corporate officers and directors. However, the ALJ declined to pierce the corporate veil on summary judgment stating that the PWBA "has presented no facts which would warrant piercing the corporate veil as to any corporate officer or director . . .."

[d] Illness, death, and difficulty gathering information not sufficient

In ***U.S. Dep't. of Labor (EBSA) v. Plan Administrator, Precision Wire Products, Inc.***, 2007-RIS-141 (ALJ, Sept. 10, 2008), the ALJ held that the Plan Administrator did not demonstrate "reasonable cause" sufficient to warrant waiver of the imposition of a penalty. He reasoned:

> Respondent simply argues that it should not be required to pay the $6,000 abated penalty because the Plan Administrator encountered obstacles associated with illness, death, and difficulty in gathering information for the audit. Respondent mistakenly compares these obstacles of limited duration to an act of god like a hurricane to excuse the long periods of time where there was absolutely no attempt by the Plan Administrator to respond in good faith to EBSA's . . . request letters . . ..

Slip op. at 8.

D. Assessment against "plan administrator"

In ***U.S. Dep't. of Labor (EBSA) v. Synergy Mfg. Technology, Inc.***, Case No. 2005-RIS-20 (ALJ, Feb. 21, 2007), Complainant asserted that liability for the $50,000.00 penalty assessed against Synergy for failure to file an IQPA for its 2002 plan year should be shared the plan's administrator, Mr. Hicks. In support of its argument, the Department noted that Mr. Hicks signed the Form 5500 as the "plan administrator" and he "personally sold Synergy to a successor . . .." The Department added that Mr. Hicks' refusal to execute a settlement agreement in this matter as well as his failure to respond to the ALJ's orders constituted evidence of Mr. Hicks' attempts to "avoid liability by all means."

The ALJ disagreed and concluded that an individual's failure to execute a settlement agreement is not evidence of avoiding liability as "no one is *required* to settle a case" (emphasis in original). Further, the ALJ noted that Mr. Hicks was not listed as a party in the settlement agreement, nor was he afforded proper notice and an opportunity to be heard at the hearing. In particular, the notice of hearing specified Synergy as the potentially liable Respondent and the Department did not move for Mr. Hicks to be joined as a party to the case.

Moreover, the ALJ cited to 29 U.S.C. § 1002(16)(A)(i) and (ii), which provides that a plan administrator is either (1) a person specifically designated by the terms of the plan's operating instrument, or (2) in the absence of such designation, then the plan administrator is the plan's sponsor. Here, the ALJ noted that the plan's operating instrument was not offered as evidence such that he could not legally conclude that Mr. Hicks was the designated "plan administrator." Finally, in an amended 2002 annual report, "Synergy states that the Board of Directors of the company administers the plan . . .." Based on the foregoing factors, the ALJ declined to hold Mr. Hicks liable for the assessed penalty.

XII. Types of dispositions

A. Consent decree

1. Regulatory provisions, generally

The regulatory provisions at 29 C.F.R. § 2570.65 provide the following with regard to the submission of a consent order or settlement:

> At any time after the commencement of a proceeding, but at least five (5) days prior to the date set for hearing, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such and the duration thereof shall be in the discretion of the administrative law judge after consideration of factors such as the nature of the proceeding, the requirements of the public interest, the representations of the parties and the probability of reaching an agreement which will result in a just disposition of the issues involved.

29 C.F.R. § 2570.65(a).

With regard to the submission of findings and an order disposing of part or all of the matter, the regulations require that the following provisions be included: (1) the order shall have the same force and effect as an order made after full hearing; (2) the entire record on which any order may be based shall consist of the notice and the agreement; (3) a waiver of any further procedural steps before the administrative law judge; (4) a waiver of any right to challenge or contest the validity of the order and decision entered into in accordance with the agreement; and (5) the order and decision of the administrative law judge shall be the final agency action. 29 C.F.R. § 2570.65(b).

2. Based on settlement by the parties

A "Consent Order and Final Judgment," based on a settlement by the parties, was issued in ***Metzler v. Mazzola***, 1997 U.S. Dist. LEXIS 13238, Case No. C-79-134 SAW (D. Ca. 1997).

B. Dismissal

1. Failure to submit statement of reasonable cause

In ***U.S. Dep't. of Labor v. Optical Corp. of America***, 1999-RIS-60 (ALJ, Nov. 23, 1999), the ALJ ordered that the administrative proceeding be dismissed on grounds that Respondent was not entitled to a hearing pursuant to 29 C.F.R. § 2560.502c-2(f) because Respondent failed to file "a statement of reasonable cause following a Notice of Intent to Assess a Penalty." It was determined that Respondent's failure to file the statement constituted a waiver of the right to a hearing and an admission of the facts alleged in the Notice of Intent.

2. Based on settlement

In ***U.S. Dep't. of Labor (PWBA) v. Arley Corp.***, Case No. 2000-RIS-4 (ALJ, Mar. 15, 2001), the ALJ issued an *Order of Dismissal* based on a settlement by the parties. In particular, Respondent terminated its pension plan after declaring bankruptcy under Chapter 11 of the Bankruptcy Code, and then converting to a Chapter 7 liquidation of assets. PWBA concluded that it had "been provided with an adequate accounting with respect to the termination of the Plan and the distribution of its assets" and PWBA recognized that "there may be no further recourse against the Plan's administrator" or against Respondent.

In ***U.S. Dep't. of Labor (PWBA) v. Central Companies 401(K) Retirement and Profit Sharing Plan***, 2000-RIS-16 (ALJ, July 19, 2000), the ALJ approved of the parties' stipulation for dismissal based on their settlement pursuant to 29 C.F.R. § 2570.65(b). *See also* ***U.S. Dep't. of Labor (PWBA) v. Industrial Distribution Group, Inc.***, 1997-RIS-21 (ALJ, Jan. 27, 1999) (Order of Dismissal was issued based on a settlement of the parties).

3. Rejected as untimely–submitted less than five days prior to hearing date

In ***U.S. Dep't. of Labor (PWBA) v. Life Printing and Publishing Co.***, 1999-RIS-49 (ALJ, Sept. 7, 1999), the ALJ rejected a *Stipulation for Dismissal and Order* because it was filed less than five days prior to the scheduled hearing date in violation of 29 C.F.R. § 2570.65(a) and (c). In particular, the agreement was submitted the day prior to the hearing date. Moreover, neither party responded to the pre-hearing order. As a result, the ALJ concluded that PWBA failed to offer any proof in support of its position, the civil money penalty assessment was reversed, and judgment was entered in favor of Respondent.

4. For lack of party

In ***U.S. Dep't. of Labor v. Continue Care Holding Corp.***, 2002-RIS-10 (ALJ, June 10, 2003), the ALJ granted Complainant's motion to dismiss its claim involving a $50,000 penalty assessment on grounds of "lack of party." In particular, Complainant asserted that pursuit of the penalty and proper IQPA would be "fruitless and futile" because Respondent was broke and defunct and its certificates of needs have been sold."

C. Failure to comply with terms of settlement agreement

In ***U.S. Dep't. of Labor (PWBA) v. Current Development Corp.***, 1996-RIS-67 (ALJ, Feb. 22, 2000), the ALJ was confronted with PWBA's allegations that Respondent failed to abide by the terms of a settlement agreement. In particular, Complainant alleged that Respondent failed to pay the penalty as required by the agreement and it failed to timely file a Form 5500 annual report and participant beneficiary statements. The ALJ noted that the agreement specifically provided that he would retain jurisdiction until compliance with the agreement was accomplished. The ALJ determined that Respondent's failure to fulfill the terms of the agreement returned the parties to the *status quo ante*, *i.e.* the positions of the parties as they existed prior to execution of the agreement). Testimony revealed that the Form 5500 annual report was not timely filed because the company president "never took the time to manually take the information from the work papers, put it on statements and get it out." The ALJ concluded that this reason did not excuse compliance with the agreement. The ALJ upheld the imposition of a $198,000 fine by the Administrator as within his authority to impose pursuant to 29 C.F.R. § 2560.502c-2. Moreover, he concluded that the $15,000 penalty negotiated in the agreement was reasonable.

By *errata* dated March 2, 2000, the ALJ corrected certain monetary calculations in his February 2000 decision. The revised order directed payment of a total penalty of $38,062.00 within 30 days, which comprised one percent of the total penalty amount of

$2,096,200.00, plus certain late charges. The ALJ further concluded that, if payment was not timely made, then Respondent would be required to pay a total of $2,311,300.00 in penalties and sanctions.

D. Summary judgment

In ***U.S. Dep't. of Labor (EBSA) v. New Design Construction Co.***, 2007-RIS-9 (ALJ, May 4, 2007), the ALJ granted summary judgment against Respondent, which failed to submit a timely IQPA report despite repeated DOL requests for the document. In upholding assessment of a $5,545.00 civil penalty against Respondent, the ALJ dispensed with Respondent's argument that it never received the EBSA's earlier requests for the IQPA. The ALJ noted that Respondent failed to present this allegation in its earlier "Reasonable Cause Statement" to the Department. Moreover, the ALJ rejected Respondent's allegation that a government representative extended the deadline to file the IQPA:

> Assuming that Respondent is correct that it contacted (the departmental representative) and received additional time to submit the IQPA, such a fact would still not preclude summary judgment in light of the warnings set forth in bold print in the (Notice of Rejection) and the (Notice of Intent to Assess Penalty) that no extension would be allowed as the law does not allow for extensions of time to respond.

Slip op. at 4.

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[1] The court described the two percent provider tax as follows:

> The tax is passed through from hospitals and other health care providers to third parties in two ways. First, under the statute, a provider is permitted to transfer the two percent tax to third party purchasers, including employee benefits plans such as Plaintiffs.
>
> . . .
>
> [T]he second way in which providers may pass the two percent tax through to third parties is by increasing their overall charges for health care services. Under this method, third-party purchasers do not receive a separate itemized charge for the provider tax. They are, however, forced to pay higher amounts for the services than they would have before the passage of (the state law).