

Client Alert

A report
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Second Circuit Concludes That Multiemployer Funds Must Disclose In Their SPDs The Participant's Evidentiary Burden To Prove A Claim Based On Unreported Earnings Where Audit Reports Are Unavailable

The U.S. Court of Appeals for the Second Circuit, in *Wilkins v. Mason Tenders' Dist. Council Pension Fund, et al.*, No. 05-2303, 2006 WL 1046210 (2nd Cir. Apr. 21, 2006), recently concluded that a multiemployer pension fund does not have a duty to audit contributing employers on more than a random-audit basis for the purpose of identifying unreported covered earnings. The Court also held, however, that the Fund was required to include in its summary plan description ("SPD") a statement of its policy requiring participants to present adequate proof of unreported covered earnings that are not revealed on audit in order to receive credit for such earnings.

Factual and Procedural History

Abraham Wilkins, a participant in the Mason Tenders' District Council Pension Fund (the "Fund"), brought a lawsuit seeking additional pension credits, based on covered work that he allegedly performed, primarily during the 1950s to 1960s, but for which contributions were not received by the Fund from employers for whom he worked.

Although Wilkins' Social Security earnings statements demonstrated that he had more earnings than those credited by the Fund, his claim was rejected because: (i) the Fund did not have any employer audits on record corroborating his claim for additional credit; and (ii) Wilkins was unable to corroborate his claim with pay stubs (which would have provided evidence that his rate of pay was in accordance with union scale for work covered by the Fund), as required by the Fund's written policy. The Fund's internal investigation also cast doubt on the merits of Wilkins' claim, as it revealed that Wilkins had performed work within other union jurisdictions, and thus that the earnings in question did not necessarily correspond to work within the jurisdiction of the Fund.

Wilkins brought suit in the U.S. District Court for the Eastern District of New York, asserting a number of claims for benefits and breaches of fiduciary duty. In particular, he argued that the Fund should bear the burden of disproving his claim for additional credit because: (i) the Fund should have audited employers on a more regular basis; (ii) the Fund may have lost audit records; and (iii) the Fund should have put Wilkins and other participants on notice of its policy regarding proof of unreported covered earnings. The District Court entered summary judgment in favor of the Fund, rejecting all of Wilkins' claims.

The Second Circuit's Decision

The Second Circuit affirmed the District Court's decision insofar as it concluded that the Fund had no responsibility for conducting anything more than random audits of contributing employers. In addition, the Court agreed that there was no evidence that the Fund failed to maintain audit records of Wilkins' employers.

The Court agreed with Wilkins, however, that the Fund was required to include in its SPD a statement of its policy requiring participants to present adequate proof of unreported covered earnings. In so holding, the Court concluded that "where it is the policy of a fund to require participants to produce records of

covered employment in the event of employer underreporting . . . the fund's failure to mention that policy in its SPD is a violation of 29 U.S.C. § 1022(b) and its regulations."

The Court cautioned that Wilkins could prevail on his claim for additional benefits (on remand to the District Court) *only* if he could demonstrate that he was "likely prejudiced" by the SPD's omission of the Fund's policy. The Court remanded the case for a determination whether Wilkins was in fact "likely prejudiced."

Implications for Plan Sponsors

First, multiemployer funds can take comfort in the Second Circuit's ruling insofar as it finds that random auditing of

employer contributions may be a reasonable means of ensuring that participants are receiving credit for their covered earnings.

Second, although the Second Circuit acknowledged that not every "idiosyncratic contingency" must be reported in an SPD, the decision will cause multiemployer plans to consider whether to include in their SPDs an explicit warning as to the participant's obligation to provide evidentiary proof of a claim based on unreported earnings, and possibly of other requirements for establishing rights to benefits.

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