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Religiously Affiliated Entities Face Prospect of ERISA Compliance

In the past two years, a wave of class action lawsuits challenged what was thought to be settled law: that employee benefit plans maintained by religiously affiliated hospitals and other religious nonprofit organizations are exempt from the federal employee benefit compliance requirements of the Employee Retirement Income Security Act of 1974 (ERISA). Not so anymore. Recently, the Third Circuit in *Kaplan v. Saint Peter's Healthcare System*, the Seventh Circuit in *Stapleton v. Advocate Health Care Network* and the Ninth Circuit in *Rollins v. Dignity Health* held that the religiously affiliated defendants' plans *were* subject to ERISA, because none of these institutions' plans were "established and maintained" by a "church." These public ministries do good work in the community, but as the circuit courts addressed ERISA, the ministries' plans were not exempt under the statute. The issue is now teed up for the Supreme Court, where writs of *certiorari* have been filed this summer in the *Saint Peter's* and *Advocate* cases. These cases are very likely to be taken up by the Court, given the federal statutory issues, church-state implications, and enormous impacts for the many thousands of employees and their church-affiliated employers.

What does it mean for a plan to be "established and maintained" by a church such that the ERISA "church plan" exemption applies? The question starts as one of interpretation. The original version of the statute, enacted in 1974, featured a narrow church plan exception. That exception was codified at subsection (33)(A) of ERISA, which continues to define a church plan as a plan "established and maintained" by a church, including a convention or association of churches. The original exception also allowed pre-existing church plans to cover church-affiliated entities, but only until 1982. Under the 1974 text, the IRS decided that a hospital run by Catholic Sisters was not a church and was not qualified for exemption. Reacting to concerns from the religious community that a church would no longer be able to cover employees of affiliated entities under its exempt plan, or that certain religious bodies would need to reorganize their financial affairs to qualify as "maintaining" a plan, Congress amended ERISA in 1980. Congress added subsection (33)(C) to ERISA, which remains current law:

> (C) For purposes of this paragraph —
> (i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches **includes a plan maintained by an organization**, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

Based on this text, the IRS changed its interpretation of ERISA and issued private letter rulings confirming the church plan status of the pension plans of the Catholic Sisters previously denied exemption, and hundreds more in the intervening decades. Should the Supreme Court affirm the holdings of the Third, Seventh and Ninth Circuit courts,

however, those church-related institutions that have received letter rulings from the IRS confirming their plans' church plan status will no longer be able to rely on those rulings in avoiding compliance with ERISA's regulatory requirements, as the IRS would almost certainly revoke those rulings prospectively.

The bolded statutory language above frames the current legal dispute. Does the word "includes" mean that the church plan "establishment" prong must be met? Or does it mean that church-associated organizations can maintain a church plan because their plans are already encompassed in the definition of a church plan? The Third, Seventh and Ninth Circuit courts reasoned that to read the provision as permitting church-associated organizations to maintain a church plan without it having been "established" by the church in the first instance would render the establishment requirement superfluous. The federal district courts considering the issue, however, were evenly divided, and half have reached the opposite conclusion. This is the question the Supreme Court will answer, assuming it accepts the case.

The requirement of church establishment begs the question "what is a church?" or "what is the church?" For some bodies the answer is relatively easy; for others with more complicated polities, less so. It is clear that the religious ministries claiming a church plan exemption for their plans since 1980 did so because they were integral parts of "a" or "the" church. If that self-understanding should now be displaced, it would mean some churches are in and others are out based on their organizational structures. That was the issue Congress expressly said it wanted to avoid in amending ERISA in 1980, and it is one with enormous constitutional implications. Indeed, should the Supreme Court affirm the Third, Seventh and Ninth Circuit courts' reasoning, the constitutional clash on these fronts cannot be avoided.

There is a tremendous potential impact if the justices affirm that ERISA does indeed reach employee benefit plans maintained by church-associated entities whose church did not establish their plans. For example, religiously affiliated employers would have to comply with the byzantine web of statutes and regulations governing employee pension plans and employee health insurance plans, with all the attendant legal guidance and filing requirements that entails. It would also mean federal oversight of how an entity can define itself as "church" — an area the government has traditionally avoided because of First Amendment concerns. In fact, beyond the doctrinal issues, the church-state question presented here cuts very deeply, because it potentially affects how churches would need to organize their financial affairs so their employee benefit plans fit within the ERISA exemption, which in turn invites significant government scrutiny into the church's or affiliated entity's books and records. That the Solicitor General has yet to take a position in these cases only adds to the uncertainty surrounding these issues.

As these important developments unfold, religiously affiliated entities will undoubtedly face not only legal and compliance concerns, but also new challenges as motivated groups continue to chip away at religious exemptions to the government's regulatory activities. Leaders of religiously affiliated entities should begin assessing the potential impact of ERISA compliance now with respect to their employee benefit plans and consider what needs to be done strategically within their organizations to bring the plans into compliance should the need to do so arise.


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