WRNewswire
An AALU Washington Report

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TOPIC: Application of ERISA to Controlled Bonus Agreement to Purchase Life Insurance

CITES: *Sarah Mozingo Martin & Mary Mozingo v. Trend Personnel Services*, No. 3:13-CV-3953-L (U.S. D. C. N.D. Texas, Nov. 23, 2015); *Tinoco v. Marine Chartering Co., Inc.*, 311 F.3d 617, (5th Cir. 2002).

SUMMARY: Company payment of premiums under a controlled bonus agreement to purchase life insurance on a small group of key employees where the company held the policies and retained a right to repayment of premiums in the event of early termination is held *not* to constitute an ERISA "welfare benefit plan" because employer administrative activities were minimal.

RELEVANCE: Members should be aware that – sometimes inadvertently - arrangements between employers and employees to purchase even individual policies may be subject to ERISA. A key factor in determining if ERISA will apply is the level of involvement by the employer. Whether a particular arrangement will constitute an ERISA plan is decided on a case by case basis, based on the specific facts and applicable cases in the relevant circuit.

FACTS: Sam Mozingo, an employee, was the insured under a $250,000 life insurance policy purchased in 2003 under a restricted bonus agreement entered into with his employer, Trend Personnel Services. Pursuant to the bonus agreement, the company agreed to pay the premiums on the policy while Mozingo remained employed. The payments were included in his income as additional compensation. If he terminated employment prior to the seventh policy year, he was required to repay the company premiums. After termination

of employment, Mozingo was responsible to pay all further premiums on the policy.

Mozingo left the company in October 2007. In October 2008, he was diagnosed with stage four cancer. He asked the company to transfer the policy to him in August 2009. The policy lapsed due to non-payment a few weeks after the transfer. Mozingo received written notice of policy lapse from the insurer in October 2009. He died in September 2010.

Mozingo's widow filed suit in the Federal Court for the Northern District of Texas alleging that the company breached its fiduciary duty under ERISA by failing to pay premiums on the policy and failing to keep her husband informed of the status of the policy. The company moved to dismiss, arguing that the wife did not have standing to sue and that the bonus agreement was not an ERISA plan and, hence, there was no ERISA-imposed fiduciary duty. While the court upheld the wife's standing as a contingent beneficiary under the policy, it agreed with the company that the bonus agreement was not covered by ERISA.

Citing *Tinoco v. Marine Chartering Co., Inc.*, the court reasoned that a bare purchase of insurance, without more, does not create an ERISA plan. An ERISA plan requires "an administrative scheme to make ongoing discretionary decisions based on subjective criteria." Under the bonus agreement, the company purchased the policies and paid annual premiums during Mozingo's employment. But that agreement specifically provided that, if his employment ended, for any reason, the company could stop paying premiums. The court argued that no subjective judgments were required, no benefits administrator was employed, and no summary benefit booklet was issued. Accordingly, the court concluded that no ERISA plan was created and the claim for violation of ERISA fiduciary duties was dismissed.

The court's conclusion appears to downplay these important facts:

- the bonus agreement stated that the company would "administer and hold all policies,"

- the company structured the bonus agreement for multiple key employees,

- the company retained control of the policies, and

- the company had a claim against the proceeds of the policies to recover its cumulative premiums in the event of employee's early termination.

In light of these facts, this case might have easily gone the other way in another district. This case clearly evidences the factually intensive nature of determining whether an arrangement between an employer and employee to purchase life insurance will be subject to ERISA.
