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TOP-HAT PLAN: ORAL PROMISE MAY BE ENFORCEABLE

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A federal district court recently concluded that an executive may base a claim for top-hat plan benefits on oral, rather than written, misrepresentations. This is notable because the court distinguished top-hat plans from plans that are subject to ERISA's plan document requirement, where the court indicated that oral promises would often be unenforceable. The case is *Hay Group, Inc. v. Bassick* (N.D. Ill. 2008).

The executive, who asserted he was hired to head the executive compensation consulting practice for a compensation consulting firm, challenged a forfeiture provision added to a SERP. Under that provision, a participant would forfeit his or her SERP benefits if, within one year after leaving his or her employment, the participant were to engage in one or more of a set of listed activities (including disclosure of confidential information or trade secrets, becoming associated with a competing business, soliciting the consulting firm's employees to leave their employment, or doing business with a client of the consulting organization). Importantly, the executive also claimed he was promised a second, supplemental, nonqualified plan to induce him to come to work for the consulting organization. This alleged promise was never reduced to writing.

The court denied the employer's motion to dismiss, and in doing so concluded that in a dispute involving top-hat benefits an estoppel claim may be based on oral, rather than written, misrepresentations. This, of course, was important with respect to the second, supplemental, plan the executive asserted he had been promised. In reaching its conclusion, the court distinguished the Seventh Circuit's decision in *Coker v. Transworld Airlines, Inc.*, 165 F.3d 579 (7th Cir. 1999), in which the Seventh Circuit concluded that estoppel claims in the ERISA context, while allowable in some situations, are "problematic" in light of ERISA's requirement that modifications to an ERISA plan be in writing and follow certain required procedures. The court distinguished *Coker*, noting that *Coker* involved a claim for welfare benefits under a plan that was subject to ERISA's written instrument requirement, while the instant claim involved a top-hat plan that was not required by ERISA to be in writing. The court asserted that the Seventh Circuit had not yet spoken on the issue of estoppel in the top-hat plan context. In reaching its conclusion, the court adopted the holding of *In re New Valley Corp.*, 89 F.3d 143 (3d Cir. 1996), where the Third Circuit stated that "[b]ecause top hat plans can be partially or exclusively oral, top hat participants may reasonably rely on oral representations of benefits."

The court refused, however, to recognize a cause of action for good faith and fair dealing in the ERISA context. In that regard, the executive had argued that the employer was barred from applying the SERP's provision providing for

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the forfeiture of benefits in the event a plan participant were to compete with the employer, solicit employees, or disclose confidential information, because the employer allegedly breached its own obligations under the executive's underlying employment agreement.

Lesson. The rationale underlying the court's decision is that estoppel claims may be based on oral, rather than written, misrepresentations where ERISA does not require that the plan be in writing. This will be the case for top-hat plans, since although they are subject to ERISA, those plans are excused from many of ERISA's requirements, including its "written instrument" requirement. Of course, ERISA's written plan requirement also does not apply to arrangements that are not subject to ERISA, such as many forms of equity-based or incentive compensation. The court's rationale suggests, therefore, that oral misrepresentations may give rise to claims relating to compensation under those types of programs as well, although employers may well have other defenses to raise, such as state corporate law requirements that, for example, stock options be granted only according to the terms of the written plan document.

The irony of the decision is that it makes it just as important to reduce to writing understandings relating to compensation of a type not subject to ERISA as it does for compensation subject to ERISA's written plan requirement. The case is also a reminder that when memorializing understandings relating to compensation, the common practice of including integration or merger clauses, reciting that the written agreements represent the complete and final agreement of parties and supersede any prior agreements (and that there are no other agreements, whether oral or written), is a good one.

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