



HR & BENEFITS UPDATE

February 23, 2011

TPA's Embezzlement Guilty Plea Reminds Plan Sponsors, Fiduciaries & Service Providers To Ensure Fiduciaries, Administrators & Staff Prudently Selected, Monitored & Bonded

The guilty plea of an Ohio-based third-party administrator to embezzlement of \$1 million in plan assets reminds employers and other employee benefit plan sponsors and members of their management participating in plan related activities, plan administrators and other plan fiduciaries and plan service providers ("plan decision-makers") of the importance of ensuring appropriate, well-documented credentialing and selection, oversight, auditing and bonding the individuals and companies acting as fiduciaries and others participating in administration of plans or their assets ("plan workforce members") to minimize their potential exposure to potential personal liability as a result of the fraud under the Employee Retirement Income Security Act (ERISA).

Cox Prosecution Reflective DOL Readiness To Prosecute Parties For Misuse of Plan Monies & Other Plan Fraud

According to a February 23, 2011 U.S. Department of Labor (DOL) announcement, Rhonda Sue Irvin Cox, owner of Irvin Administrative Solutions LLC (IAS), pleaded guilty to the embezzlement of \$1 million of retirement plan assets from client plans administered by IAS. The DOL reports that between January 2003 and April 2007, Cox plead guilty to using her position with ISC to embezzle the funds from 12 of 59 plans for which IAS served as a third party administrator. Cox also pleaded guilty to one count of making false statements in documents required under ERISA to be kept and certified by the plans' administrator. Scheduled to be sentenced on June 1, 2011, Cox faces a maximum of five years in prison on each criminal count, a \$250,000 fine and a special assessment. Cox is scheduled to be sentenced on June 1, 2011.

The DOL and Justice Department have a long-standing record of aggressive investigation and prosecution of embezzlement or other fraud impacting health and other employee benefit plans. Their criminal and civil enforcement and prosecution record makes clear this commitment remains strong. During Fiscal Year 2010, DOL investigations led to the indictment of 96 persons for crimes related to employee benefit plans. The DOL's enforcement record reflects its continued commitment to criminal prosecution of individuals defrauding employee benefit plans. See [US Labor Department Announces Nationwide Enforcement Actions To Protect Millions Of Dollars In Worker Retirement And Health Benefits \(11/16/10\)](#). See also e.g., [Michael Paul Molitor Pleads Guilty In U.S. Federal Court \(01/24/11\)](#); [Minister Sentenced To 30 Months For Embezzlement Of Union Funds \(01/18/11\)](#); [Bucks County Man Sentenced In Fraud And Embezzlement Cases \(01/11/11\)](#); [President Of Drywall Company Pleads Guilty To Misappropriating \\$190,000 Is Wages, Pension And Benefit Funds \(01/04/11\)](#); [Federal Jury Finds Employer Guilty Of Stealing Nearly \\$53,000 From His Employees' 401k Profit Sharing Plan \(10/29/10\)](#); [Former Health Care Plan Employee Admits Embezzling Nearly \\$50,000 From Plan \(10/20/10\)](#); [West Suburban Businessman Pleads Guilty To Tax Fraud; Agrees To Pay Restitution To IRS And Various Employee Benefit Funds \(10/15/10\)](#); [Lemoyne Business Owner Sentenced In Federal Court Today For Embezzlement \(10/01/10\)](#); [Holyoke Business Owner Sentenced For Embezzlement And Tax Fraud \(10/15/10\)](#); [Connecticut Court Rules Pension Trustees Legally Liable To Restore Misused Pension Plan Assets In Response To US Labor Department Motion \(02/17/11\)](#); [US Labor Department Sues Janesville, Wis.-Based Premier Vending Inc. And President To Recover More Than \\$26,00 In Employee 401\(K\) Contributions \(01/19/11\)](#); [Judge Orders Minnesota-Based Copy Cat Business Systems And Former Owners To Repay More Than \\$13,000 To Company's SIMPLE IRA Plan \(01/18/11\)](#);

Plan Sponsors, Fiduciaries & Service Providers May Face Civil Liability From When Others Defraud Their Plans

While plan decision-makers generally are aware that individuals defrauding health or other employee benefit plans risk criminal and civil prosecution, many fail to recognize their own potential civil liability exposures that may arise out of the fraudulent acts or other misconduct of another plan workforce member.

Embezzlement of plan assets is one of many acts of misconduct that can create potential fiduciary liability exposure for plan decision-makers under ERISA. Until confronted with potential fraud, misconduct or other misfeasance by a plan fiduciary, service provider or other plan workforce member, many plan decision-makers lack an adequate appreciation of the personal liability they may incur if they cannot demonstrate appropriate steps were taken to protect their health plan from this misconduct.

Under ERISA's fiduciary responsibility rules, embezzlement or other misuse of employee contributions or other plan assets as well as certain other misconduct or misfeasance by a plan fiduciary, service provider or other plan workforce member can create personal liability exposures for plan decision-makers with responsibility or discretionary authority over the selection, retention, or management of plan workforce members if the plan decision-maker cannot demonstrate appropriate steps were taken to select, monitor and bond the plan workforce and other prudent action was taken to prevent and redress the fraud. See [Meeting Your](#)

Fiduciary Responsibilities (US Department of Labor); DOL Investigation Update: What to Expect in FY 2010. See also, e.g., *Solis v. Couturier*, 2009 WL 1748724, (E.D.Cal. 2009); *In re GS Consulting, Inc.*, 414 B.R. 454, 459, (N.D.Ind. 2009); *Chao v. Linder*, 2007 WL 1655254 (N.D.Ill. 2007); *Chao v. Wheeler*, 2007 WL 4233464 (N.D.Ind. 2007); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F.Supp.2d 511(S.D.Tex., 2003); *Brock v. Self*, 632 F.Supp. 1509, 1520 (W.D.La. 1986); *Miller v. Lay Trucking Co., Inc.*, 606 F.Supp. 1326, 1335 (N.D.Ind. 1985); *Miller v. Lay Trucking Co., Inc.*, 606 F.Supp. 1326, 1335 (N.D.Ind. 1985); *Brink v. DaLesio*, 496 F.Supp. 1350 (D.C.Md., 1980) Accordingly, health plans, their sponsors, fiduciaries, service providers, their management, and others serving as, or selecting, managing or retaining companies or individuals that participate in the handling of health plan assets or administration should act to strengthen their health plans and themselves against these exposures.

Risk Management Strategies & Tips

When embezzlement or other concern affecting their health plan arises, plan decision-makers concerned about protecting their health plans and themselves should be prepared to present well-documented evidence of:

- The scope and limits of their responsibility, authority, awareness, and potential for the selection, monitoring and oversight of the plan workforce member or others responsible for the performance of those actions;
- The scope and limits of their actual and deemed awareness of the misconduct or potential for the misconduct;
- Plan workforce members were appropriately credentialed and bonded in accordance with ERISA and other applicable requirements;
- In light of their role and authority with regard to the plan or its assets and knowledge of the circumstances relating to the misconduct, they acted prudently protect the plan before, during and after the discovery of the potential misconduct in connection with their involvement with and/or supervision of others responsible for the selection, management, supervision and bonding of the wrongdoer; and
- That appropriate, well-document steps are taken to redress and report misconduct or other concerns, including where necessary the reporting of misconduct or resulting terminations as required to comply with ERISA and other applicable laws.

While these and other steps can help strengthen the ability of a plan decision-maker to liability exposures that can result from the other plan workforce member's embezzlement of plan assets or other misconduct, plan sponsors and plan decision-makers also should plan for the potential financial costs and other demands that are likely to arise in the event that it becomes necessary to investigate or redress fraud or other misconduct. Other steps that plan sponsors and decision-makers may wish to consider to strength their plans and the legal defensibility of their exercise of plan related responsibilities include but are not necessarily limited to:

- Designing the plan and its procedures for handling plan assets and other plan responsibilities to minimize risks of abuse and facilitate oversight when designing the plan and contracting with plan service providers;
- Requiring that all plan fiduciaries, service providers and their employees and agents agree in writing to and are subjected to appropriate ongoing background check and other credentialing, monitoring and investigation. In this respect, plan decision-makers should not overlook the advisability of ensuring that these procedures are applied to themselves and members of their own workforce.
- Regularly and on an as-needed basis in response to emerging situations, conducting well-documented analysis of their evaluation of whether additional investigation, monitoring or other action is necessary to prudently protect the plan and its assets including securing the written opinions of outside counsel and other consultants as appropriate;
- Obtaining training and other advise from qualified legal counsel about their potential status as a plan fiduciary, the scope and nature of their responsibilities and the best means to structure and document their and others roles and responsibilities and to conduct these and other actions to minimize potential fiduciary or other exposures;
- Obtaining suitable fiduciary liability and other errors and omissions insurance coverage, bonds, indemnification and other protections to provide for the funding or mitigation of costs of investigation, defense and other losses likely to result if it becomes necessary to investigate or redress a problem; and
- When a potential problem arises, acting promptly in a carefully documented, prudent manner to investigate and respond to the concern including, seeking the advice of qualified legal counsel regarding what actions are legally required or advisable and how best to perform those actions.

For Help With Investigations, Policy Review & Updates Or Other Needs

If you need help investigating or responding to fraud or other misconduct affection a health or other employee benefit plan, dealing with an employee benefit plan investigation or enforcement action by the Labor Department, private plaintiffs or another public or private party, reviewing current or proposed health plan processes or procedures, or responding to other employee benefit, labor and employment or other related controls and practices, please contact the author of this update, attorney Cynthia Marcotte Stamer [here](mailto:stamer@stamercottelaw.com) or at (469)767-8872.

The Chair of the American Bar Association (ABA) RPTE Employee Benefits & Other Compensation Committee, a Council Representative on the ABA Joint Committee on Employee Benefits, Government Affairs Committee Legislative Chair for the Dallas Human Resources Management Association, and past Chair of the ABA Health Law Section Managed Care & Insurance Interest Group, Ms. Stamer works, publishes and speaks extensively on HIPAA and other privacy and data security, health plan, health care and other human resources and workforce, employee benefits, compensation, internal controls and related matters.

For more than 23 years, Ms. Stamer has counseled, represented and trained employers and other employee benefit plan sponsors, plan administrators and fiduciaries, insurers and financial services providers, third party administrators, human resources and employee benefit information technology vendors and others privacy and data security, fiduciary responsibility, plan design and administration and other compliance, risk management and operations matters. In connection with this work, Ms. Stamer regularly counsels and helps clients to defend a broad range of clients about employee benefit plan fraud and other fiduciary

responsibility concerns. Throughout her career, she has represented and served as special counsel to health and other employee benefit plans, plan sponsors, plan service providers, officers, directors and other management officials, bankruptcy trustees, debtors and creditors, and others in connection with health and other employee benefit plan fraud and other fiduciary responsibility and related investigations, prosecutions and other actions involving the Labor Department, IRS, HHS, Justice Department, state insurance and attorneys general, bankruptcy actions, and participant, beneficiary and vendor disputes. She also is recognized for her publications, industry leadership, workshops and presentations on these and other employee benefits, insurance and human resources concerns and regularly speaks and conducts training on these matters. Her insights on these and other matters appear in the Bureau of National Affairs, Spencer Publications, the Wall Street Journal, the Dallas Business Journal, the Houston Business Journal, and many other national and local publications. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see [here](#) or contact Ms. Stamer directly.

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