

10TH CIRCUIT IMPOSES NEW PARTICIPANT NOTICE REQUIREMENT TO ACHIEVE DEFERENTIAL STANDARD OF REVIEW

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Over 30 years ago, the Supreme Court, in *Firestone Tire and Rubber v. Bruch*, ruled that benefit denials would be reviewed under a de novo standard unless the terms of the plan document gave the plan administrator or fiduciary discretionary authority to determine eligibility for benefits and to construe the terms of a plan. Since that time, plans have been drafted to provide for this discretionary authority for plan administrators and fiduciaries, and courts have consistently upheld that reviews of these administrative actions would be done on a deferential basis and overturned only if the decision was arbitrary and capricious or represented an abuse of discretion.

Recently, the 10th Circuit Court of Appeals held that there is an additional requirement beyond having this language contained in the governing plan document. In this case, the plan document contained the language needed to grant discretion to the plan administrator and fiduciary.

However, the 10th Circuit held that the plan administrator was not entitled to a deferential level of review because the participant/plaintiff was not provided notice of the plan administrator's discretionary authority. The Court found that the summary plan description did not state that the plan administrator had the discretion to make determinations and it did not notify the participant that additional language regarding the standard of review was located in the governing plan document. The decision by the 10th Circuit was a split decision and the dissenting justice in the case strongly argued that the majority's decision was not supported by the language of ERISA and that there was no basis in 10th Circuit law for this new disclosure requirement.

In light of this decision, employers, especially those who have plans that operate within the 10th Circuit, should review summary plan descriptions to determine if they provide for the newly required disclosure of plan administrator discretionary authority. *Lyn M. v. Premera Blue Cross*, 10th Cir., 2020.

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