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ERISA Litigation Update

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Fourth Circuit Provides Helpful Guidance for Employers Seeking to Keep Long-Term Incentive and Other Bonus Programs Outside of ERISA

The decision provides useful guidance for employers designing long-term incentive, retention, and performance-based compensation programs, particularly programs that include multi-year vesting schedules or forfeiture provisions.

On April 17, 2026, the U.S. Court of Appeals for the Fourth Circuit affirmed summary judgment for Merrill Lynch and Bank of America in *Milligan v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, holding that Merrill Lynch's WealthChoice Award program was a bonus payment program, not an ERISA-covered pension plan.[1] The decision provides useful guidance for employers designing long-term incentive, retention, and performance-based compensation programs, particularly programs that include multi-year vesting schedules or forfeiture provisions.

In *Milligan*, the Fourth Circuit held that, although the WealthChoice Award program delayed payment for eight years and conditioned payment on continued employment, it did not provide retirement income and did not systematically defer compensation until termination of employment or beyond.[2] Instead, the court concluded that the program was a "retention-based bonus" arrangement outside ERISA under the Department of Labor's bonus-plan regulation, 29 C.F.R. § 2510.3-2(c).[3]

The decision is significant because plaintiffs continue to test whether incentive compensation, retention awards, and similar arrangements can be characterized as ERISA pension plans, potentially triggering ERISA's vesting, anti-forfeiture, fiduciary duty, and remedial provisions. *Milligan* gives employers a helpful roadmap for structuring and defending long-term incentive arrangements that are intended to remain outside of ERISA.

Background

Merrill Lynch's WealthChoice Award program provided annual contingent cash awards to select high-performing financial advisors who satisfied revenue-based eligibility requirements and remained continuously employed through an eight-year vesting period.[4] When an award was granted, a notional account was created, but no funds were set aside; the award agreement instead reflected an unsecured, unfunded, contingent promise to pay the notional account's value after vesting.[5] Once an award vested, payment was mandatory and generally required promptly after the vesting date; advisors could not elect to defer payment until termination or retirement.[6]

The plaintiff, a former Merrill Lynch financial advisor, voluntarily resigned in 2021 and forfeited unvested WealthChoice Awards.[7] He then filed a putative class action alleging that the WealthChoice program was an "employee pension benefit plan" under ERISA and that the program violated ERISA's vesting and anti-forfeiture rules.[8] The district court granted summary judgment to Merrill Lynch, and the Fourth Circuit affirmed.[9]

The Fourth Circuit's Decision

In its decision, the Fourth Circuit acknowledged that, to state a claim under ERISA, a plaintiff must show that "the challenged compensation scheme is an employee pension benefit plan governed by ERISA."[10] ERISA defines an "employee pension benefit plan" to include a plan, fund, or program that either provides retirement income to employees or results in a deferral of income by employees for periods extending to termination of employment or beyond.[11] The Department of Labor's bonus-payment plan regulation excludes from this definition bonus payments for work performed, unless those payments are systematically deferred to termination or beyond, or are structured to provide retirement income.[12]

The Fourth Circuit first rejected the plaintiff's argument that the Department of Labor's regulation should be disregarded after *Loper Bright*.[13] The court concluded that Congress delegated authority to the Secretary of Labor to define technical and trade terms used in ERISA, and that the Department acted within that authority in clarifying the boundaries of the term "employee pension benefit plan."[14]

The court then surveyed decisions from other circuits and identified a non-exhaustive list of factors relevant to determining whether a program is a bonus payment plan rather than an ERISA pension plan:

- whether the program contemplates universal employee participation or imposes heightened eligibility requirements;
- whether the program is funded with money that would otherwise be immediately payable to the employee;
- whether the program is actually funded or instead involves phantom or notional investments;
- whether employees can unilaterally postpone payment until termination or beyond;
- whether the program is presented as a vehicle for obtaining retirement income; and
- whether firm performance affects program payments.

The court emphasized that these factors are not exhaustive and that not every factor must be present in every case.[15]

Applying those factors, the Fourth Circuit held that the WealthChoice Award program "comfortably qualifie[d] as a bonus payment plan."[16] The court emphasized that the program was limited to high-performing advisors who met production thresholds; awards were contingent on continued employment and were not funded with money employees were otherwise immediately entitled to receive; notional accounts were unfunded and unsecured; vesting triggered automatic and mandatory payment; approximately 92% of advisors who were paid WealthChoice Awards between 2018 and 2024 were current employees; and the program was communicated as a retention and business-alignment incentive, not as a pension or retirement-income vehicle.[17]

Judge Wilkinson concurred to emphasize the practical implications of the court's ruling. He explained that the court's approach preserved ERISA's role in protecting retirement-like income while maintaining businesses' flexibility to reward employee loyalty and performance through compensation arrangements that are not designed to provide retirement income.[18]

Key Takeaways for Employers

1. **Long vesting periods do not necessarily create an ERISA pension plan.** The Fourth Circuit rejected the notion that an eight-year vesting period, standing alone, transformed the WealthChoice Award program into an ERISA pension plan. The key question was not simply whether payment was delayed, but whether the program systematically deferred income until termination or retirement or was designed to provide retirement income.
2. **Program design and communications matter.** The court relied on how Merrill Lynch described and structured the program. Employers seeking non-ERISA treatment should consider whether plan documents, award agreements, and employee communications consistently describe the program as a bonus, incentive, performance, or retention arrangement—not as a retirement, pension, deferred compensation, or savings program.
3. **Employee control over payment timing can be important.** The court distinguished arrangements in which employees may elect to defer compensation or choose payment at termination or retirement. In *Milligan*, advisors could not unilaterally defer payment;

once the vesting conditions were satisfied, payment was automatic and mandatory. That feature supported non-ERISA treatment.

4. **Unfunded notional accounts may support bonus-plan treatment.** The program's use of unfunded, unsecured notional accounts indexed to reference investments did not convert the arrangement into an ERISA plan. The court viewed those features as consistent with a contingent promise to pay a bonus, not as evidence that employees had deferred earned income.

5. **Employers may consider reviewing incentive and retention programs after *Milligan*.** Employers with long-term incentive plans, retention awards, or performance-based compensation programs may want to review eligibility rules, vesting provisions, payment timing, funding mechanics, forfeiture language, and employee communications. *Milligan* provides helpful defense arguments, but the analysis remains fact—and therefore program—specific.

   Finally, although *Milligan* does not specifically address top hat plans, its reasoning is relevant to employers that maintain selective, unfunded, long-term incentive arrangements: the presence of features commonly associated with top hat plans—limited eligibility, unfunded bookkeeping accounts, and delayed payment—does not itself establish that an arrangement is an ERISA pension plan. Employers should first assess whether the arrangement falls outside ERISA altogether, including under the DOL's bonus-plan regulation, before turning to whether any ERISA-covered arrangement qualifies for top-hat treatment.

Conclusion

Milligan is a significant decision for employers defending long-term incentive and retention compensation programs against ERISA-based challenges. The Fourth Circuit's factor-based analysis provides a practical framework for assessing whether a program is a bonus arrangement outside ERISA or a pension plan subject to ERISA's statutory requirements.

Employers—especially those operating bonus programs for employees working in the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia)—should consider reviewing existing and proposed incentive arrangements to confirm that plan design, documentation, and communications align with the intended non-ERISA treatment.

[1] *Milligan v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 173 F.4th 128, 131 (4th Cir. Apr. 17, 2026), *amended* (Apr. 20, 2026).

[2] *Id.*

[3] *Id*.

[4] *Id.* at 132.

[5] *Id.* at 133.

[6] *Id*.

[7] *Id.*

[8] *Id.*

[9] *Id*.

[10] *Id.* at 134 (citing *Fraver v. N.C. Farm Bureau Mut. Ins. Co.*, 801 F.2d 675, 677 (4th Cir. 1986)).

[11] 29 U.S.C. § 1002(2)(A).

[12] 29 C.F.R. § 2510.3-2(c) (2025).

[13] *Milligan*, 173 F.4th at 134.

[14] *Id.* at 134–36 (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024)).

[15] *Id.* at 137.

[16] *Id.* at 138.

[17] *Id.* at 138–39.

[18] *Id.* at 140–41 (Wilkinson, J., concurring).

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