

**MEMORANDUM TO
REBECCA MARSHALL, DIRECTOR
ATLANTA REGIONAL OFFICE
UNITED STATES DEPARTMENT OF LABOR
EMPLOYEE BENEFIT SECURITY ADMINISTRATION**

**FROM THE
NORTHWEST MASTER EXECUTIVE COUNCIL
OF THE
ASSOCIATION OF FLIGHT ATTENDANTS**

**REGARDING COMPLIANCE FAILURES AND
BREACHES OF FIDUCIARY DUTY BY
DELTA AIR LINES
REGARDING ITS GROUP HEALTH PLANS**

August 2, 2010

I. INTRODUCTION

This memorandum is submitted by the officers of the Northwest Master Executive Council (“MEC”) of the Association of Flight Attendants - CWA (“AFA”), the collective bargaining representative for the flight attendants formerly employed by Northwest Airlines (“NWA”) and now employed by Delta Air Lines (“Delta”) after the two airlines merged, both in their representative capacities and individually.

The purpose of the memorandum is to bring to the attention of the U.S. Department of Labor (“DOL”) the egregious and multitudinous failures by Delta to provide clear and timely information to its employees regarding open enrollment in the Delta health plans during 2009. We believe that Delta’s failures constituted serious and repeated breaches of both the letter and spirit of Delta’s fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). Moreover, as described in the memorandum, events since that open enrollment period lead us to conclude that the open enrollment period to occur in a few months will lead to at least as many failures as last year. We therefore ask that the DOL require Delta to come into compliance and to require sufficient planning and proper execution of the 2010 open enrollment period so that it will provide participants with the information needed to make crucial choices regarding their medical coverage.

II. BRIEF FACTUAL BACKGROUND

On October 29, 2008, Delta and NWA completed a merger. As a result of the merger, the consolidated company, with approximately 75,000 employees, now operates using the Delta name. Prior to the merger, both Delta and NWA operated group health plans. Following the merger, Delta became responsible for administration of the health plans covering all employees of the merged airline. NWA flight attendants are represented by the AFA. As part of the merger, Delta became the contracting party to the collective bargaining agreement covering NWA flight attendants.

In Fall 2009, Delta conducted an “open enrollment” period for its health plans during which employees could elect to change the benefits he or she received under the various programs offered under the company’s health plan. Pre-merger NWA employees could elect to enroll in the Delta health plans or the NWA health plan.¹

¹ Pre-merger Delta employees could only enroll in the Delta health plans.

Recognizing the inferiority of the options available under its pre-merger health plan, Delta unveiled a new benefit option for the 2010 open enrollment, entitled "PPO Option A." The PPO plan covering NWA flight attendants was labeled "PPO Option B." In addition, Delta offered several different types of account-based plans, such as health reimbursement accounts ("HRAs"), health savings accounts ("HSAs"), and flexible spending accounts ("FSAs"). These plans are summarized in the 2010 Delta Benefits Guide ("Benefits Guide"), which was provided electronically to Delta employees, and a copy of which is attached as Exhibit A to this memorandum. Flight attendants who were former NWA employees were entitled to enroll in the NWA option or select one of the options open to all Delta employees.

Countless reports to each member of the MEC, as well as our own experiences during open enrollment, demonstrate a clear pattern by Delta of failing to plan for or execute properly the myriad of tasks required for an open enrollment for an employee group as large as this, with thousands of employees needing to choose among plans in which they had been participating and plans offered by their new employer.

It appears that Delta's goal was to attempt to do the bare minimum legally required to provide information regarding the NWA health plan option. Delta failed abysmally at even this minimal level of executing the open enrollment. Delta provided almost no information regarding the NWA option and instead undertook a campaign that seemed clearly aimed at driving all employees to Delta account-based plans, which would ultimately save the company millions of dollars.

The MEC held several meetings with flight attendants regarding the 2010 open enrollment. Hundreds of flight attendants came to these meetings, all confused and concerned about their health benefits, and unsure of what steps to take in order to make an informed choice. The detailed statements provided to us by many individual flight attendants evidence the following:

- There was a profound lack of planning; as discussed below, it is our understanding that as of August 2009, Delta had held no internal meetings to plan for the Fall open enrollment.
- Delta repeatedly failed to provide information on the NWA option, so that flight attendants could compare the cost and benefits of the NWA option with the Delta options; in almost every case, either no information was provided, or participants were told to refer to the NWA plan materials without providing copies of those materials.

- When it became clear that the open enrollment was going so poorly, Delta prepared a brochure on the open enrollment that was to be mailed to each participant's home. It's our understanding that Delta first outsourced that document to a contractor who Delta believed might not meet the deadline; Delta then gave the same job to another contractor. Both contractors produced and mailed the same brochure, so duplicate mailings arrived at the flight attendants' homes a few days apart, adding to the confusion. Those brochures expressly stated that they did not describe the benefits offered by the NWA option.
- Telephone representatives of the Delta benefits department told flight attendants repeatedly that they had been given no information on the NWA option and therefore could not offer any assistance to flight attendants attempting to compare costs and benefits of the several plans available to them.
- Materials that were provided to the flight attendants were significantly skewed towards Delta's account options (the FSAs, HRAs and HSAs), each of which were options likely to cost Delta less than other options available to the flight attendants. When a fiduciary fails to provide information needed by participants in order to make important decision regarding plan benefits, and does so because it is in the fiduciary's own financial interest, that fiduciary breaches his duties under ERISA and potentially engages in ERISA prohibited transactions.
- Delta's open enrollment website failed to operate for long periods of time and often would shut down part of the way through the arduous process required in order to make the elections required by Delta's design of the website. We received repeated reports of participants spending several hours trying to complete the enrollment process, and those participants frequently were unable to actually finish the process.
- One part of the website theoretically allowed participants to pull up the Plan's data on their personal medical expenses but errors were found repeatedly, demonstrating either that participant information was being commingled in some improper way or that data had been entering incorrectly in countless instances.
- Delta appears to have essentially abandoned any effort to handle the open enrollment process on its own and ceded responsibility to outsourced providers without giving them information about the NWA option covering both the active employees and the retirees,

- Outside the open enrollment process, Delta eliminated a major PPO in the Midwest that had serviced thousands of former NWA employees, replacing it with a much smaller PPO that could not provide the services provided by the former PPO. This change was made without creating a clear process for those in treatment for serious illness, such as cancer or coronary disease requiring surgery or even transplant. Delta promised to add geographic coverage for that area but failed to do so.
- Regarding the Medicare Supplement Plan open to former NWA flight attendants, Delta told flight attendants to stop paying for COBRA and to elect a particular Delta option, but Delta then dropped that plan shortly thereafter. One flight attendant tried desperately to get Delta representatives to help her as her health deteriorated and she died without having the coverage she expected.

As the details and discussion provided below will show, Delta has failed to fulfill both the letter and the spirit of its responsibilities as a fiduciary under ERISA and as an employer bound by a collective bargaining agreement.

III. BREACH OF FIDUCIARY DUTY

ERISA provides special rules governing the conduct of ERISA plan fiduciaries. This section first describes, and then analyzes, Delta's failures in light of those rules.

In general, a fiduciary under ERISA is an individual or entity that has discretionary authority in the management and administration of the plan.² Additionally, ERISA requires that the plan document "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."³

When Delta and NWA merged in 2008, Delta was the surviving entity. As such, it became the sponsor of the NWA health plan and also the contracting party with respect to the AFA collective bargaining agreement. The merger created one company and one health plan, operating under the Delta name. Delta also assumed responsibility for administering all pre-merger health plan options that existed at Delta and NWA. As such, Delta is a plan fiduciary not

² ERISA § 3(21)(A), 29 U.S.C. § 1002((21)(A). The relevant portion of the definition is the following: "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

³ ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

only with regard to the Delta health plan options, but also the NWA health plan option. Delta therefore owes a fiduciary duty to participants in the former NWA health plan.

**A. Common Law Duty of ERISA Fiduciaries –
Disclosure of Material Information**

As noted below, a fiduciary under ERISA must act solely in the interest of participants and beneficiaries. Fiduciaries breach this duty if they mislead plan participants or misrepresent the terms or administration of the plan. A plan fiduciary must disclose material facts that affect the interests of plan participants and beneficiaries. The bedrock case establishing this requirement is the Supreme Court case of *Varity v. Howe*.⁴ *Varity* is important to fiduciary breach claims and to issues relating to the Delta open enrollment for two reasons:

- (1) The Supreme Court held that communications on plan benefits are a “fiduciary function,” even if the communications are not required by ERISA and are made as part of normal business activities; and
- (2) The Court held that ERISA imposes a duty on plan fiduciaries not to affirmatively miscommunicate or mislead plan participants about material matters regarding their ERISA plan.⁵

With regard to the Delta open enrollment, Delta provided both misleading information and failed to provide complete information, which omissions rose to level of being misleading to plan participants. Whether these shortcomings were intentional, inadvertent, due to Delta’s failure to provide adequate resources to execute the 2010 open enrollment, or simply mismanagement of the open enrollment, Delta’s failures create the same harm that the Supreme Court was trying to prevent in *Varity*. The Court stated that: “[t]o participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not to act ‘solely in the interest of the participants and beneficiaries.’ As other courts have held, ‘[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA,’ [citation omitted].”⁶

The Court in *Varity* did not address “whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries.”⁷ Courts traditionally applied the common law of trusts to determine when a fiduciary had a duty

⁴ 516 U.S. 489 (1996).

⁵ *Id.* at 505.

⁶ *Id.*

⁷ *Id.* at 506.

to disclose. Under the common law of trusts, a trustee's duty to disclose was only triggered by a specific request for information from the beneficiary.⁸ Later cases have recognized, however, that a plan fiduciary may have an affirmative duty to provide participants with information that the participant does not know and needs to know for his protection.⁹ In the context of an open enrollment, a participant may not know what all of his or her options are and the employer should provide the participant meaningful information that allows the participant to fully consider all the options and make the best choice. Delta failed to provide such meaningful information to NWA flight attendants.

B. Solely in Interest/Exclusive Purpose Requirement

ERISA requires fiduciaries to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" and for the exclusive purpose of (1) providing benefits to participants and beneficiaries, and (2) defraying reasonable expenses of administering the plan.¹⁰ This is sometimes referred to as a fiduciary's duty of loyalty.

The fiduciaries must act in the manner which they reasonably conclude will best promote the interests of participants and beneficiaries. Their decisions must be made "with an eye single to the interests of the participants and beneficiaries."¹¹

An additional component of the duty of loyalty is the requirement that a fiduciary disclose material information.¹² In a case that discusses the duty of loyalty, one of the defendants was a multiemployer trust that provided group health insurance benefits. Plaintiff was a sole proprietorship. One of the beneficiaries of the plaintiff's plan suffered a severe accident that resulted in extensive medical claims. In an effort to avoid part of the liability for the claims, Provident re-priced the premium schedule to a level that was cost-prohibitive for plaintiff. BIT failed to notify plaintiff of these cost increases, in part due to marketing concerns. The court determined that amount of the price increase was material to plaintiff, and that BIT

⁸ *In re Enron Corporation Securities, Derivative & ERISA Litigation (Tittle v. Enron Corp.)*, 284 F.Supp.2d 511, 555 (S.D. Tex. 2003).

⁹ *See, e.g., Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.*, 93 F.3d 1171, 1181 (3d Cir.1996).

¹⁰ ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

¹¹ *Id.*

¹² *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995). See Part II.D, *infra*, for a more detailed discussion of a fiduciary's duty to disclose.

had a duty to disclose such information.¹³ The duty recognized by the court in that case, matches the duty that Delta owed regarding the open enrollment.

C. Prudence Requirement

ERISA fiduciaries must also act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”¹⁴

The legislative history of ERISA indicates that the source of the prudent person test is the common law of trusts, but also instructs that the standard should be interpreted “bearing in mind the special purpose and nature of employee benefit plans.”¹⁵ Several courts have interpreted this language to mean that Congress imposed stricter prudence requirements upon fiduciaries of ERISA plans.¹⁶

Case law indicates that a key in assessing a fiduciary’s prudence is the process by which the fiduciary addresses issues and takes action.¹⁷ The end result of a decision is not as important as the method the fiduciary uses to arrive at the decision.¹⁸ Although most of the cases dealing with the prudent man standard address fiduciaries’ investment decisions, similar requirements apply to any decision a fiduciary makes. Ultimately, whether a plan fiduciary acted prudently is a factual inquiry.¹⁹

D. Obligation to Follow Plan Documents

An ERISA fiduciary is required to act “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA].”²⁰ Although ERISA imposed some restriction on plan provisions, it does permit a

¹³ *Id.* The plaintiff ultimately failed to establish a breach of fiduciary duty claim because plaintiff could not show that the plan suffered a loss as a result of the defendant’s breach.

¹⁴ ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

¹⁵ H.R.Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad.News at 5083.

¹⁶ *See, e.g., Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1984); *Sinai Hospital of Baltimore v. National Benefit Fund for Hospital & Health Care Employees*, 697 F.2d 562, 565 (4th Cir.1982).

¹⁷ *See, e.g. Liss v. Smith*, 991 F.Supp. 278, 297 (S.D.N.Y. 1998).

¹⁸ *California Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1043-45 (9th Cir. 2001).

¹⁹ *See, e.g., Harley v. Minnesota Mining & Mfg. Co.*, 42 F. Supp.2d 898, 907 (D.Minn. 1999), *aff’d*, 284 F.3d 901 (8th Cir. 2002) (“ [t]ypically, whether a fiduciary acted prudently - or in other words, as a reasonably prudent fiduciary - is a question of fact”).

²⁰ ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

specific statement of an administrator's duties, and, if the plan contains such a statement, those provisions control.²¹

IV. FACTS ESTABLISHING FIDUCIARY VIOLATIONS

This section deals with the common difficulties NWA flight attendants faced during Delta's open enrollment for the 2010 plan year. It will then provide a brief summary of how those facts show that Delta's handling of the 2010 open enrollment violated ERISA.

A. Delta's lack of knowledge/information regarding the NWA health plan

As a fiduciary of the former NWA health plan, Delta is required to act prudently and solely in the interest of participants and beneficiaries. Surely a prudent fiduciary would ensure that the plan representatives have sufficient knowledge to answer participants' questions regarding their health plan options. The 2009 NWA health plan SPD stated that "[i]f you have questions about the Plan, you should contact Northwest Airlines, Inc." Because Delta was the surviving entity, it stepped into the shoes of NWA. Therefore, the SPD essentially counseled participants to contact Delta if they had any questions. A prudent fiduciary would have realized that participants would likely call with questions, especially during an open enrollment period. Delta should have been prepared to handle inquiries from NWA flight attendants, but the litany of complaints shows that Delta was woefully ignorant with respect to the NWA option.

NWA flight attendants were forced to rely on their bargaining representatives, who are not ERISA fiduciaries with respect to the NWA option, for information about their benefits. At meetings held by the MEC to discuss open enrollment issues, flight attendants reported an inability to access the documents they need to make an informed decision. At these meetings, no one other than AFA counsel had been able to find, download, and print the relevant documents other than the short brochure that Delta twice mailed to participants. This information should have been available from Delta, the plan fiduciary, and failure to provide such information is a breach of Delta's fiduciary duties under ERISA.

The following is but a sample of complaints from NWA flight attendants showing Delta's complete lack of knowledge about the NWA option. A more complete listing is attached as Exhibit B to this memorandum.

"After spending over 4 hours plus today trying to get answers on Plan A and Plan B. I am still waiting for answers. Delta Dental did not know about Plan A. if it

²¹ *Offutt v. Prudential Ins. Co. of America*, 735 F.2d 948, 950 (5th Cir. 1984).

even existed. I was informed by My Delta [the Delta website where open enrollment was done] that booklets will be sent later next week or early the 2nd week of Nov. That puts us very close to the closing date of the enrollment, Especially if you are in training and flying. Thus, not at home to receive the information. For the deductible on Davis Vision I had to make a separate call. Also for United Healthcare. This is very unfair and spending my time off doing this along with other flight attendants to get the information to make an informed decision is WRONG."

"I'm writing to report an issue I had with 800-My Delta call center. I called on the last day (couldn't get through with my employee number the week prior) and understandably was on hold for over 30 minutes due to the call volume. I had two questions for the representative:

1. What is the difference between PPO A and PPO B option? (I could not find any information about the PPO B option in the flyer or website) ...

The man taking my call had no idea what the difference in the PPO options were and he told me that I did not have the option for long term disability for my work group. I said I thought I saw this option available at one time and he once again told me that the flight attendant group did not have that option."

"I recently called MyDelta regarding medical coverage. ... I received 3 different answers from 3 different people: 1) My Delta. 2) UHC outsourced people, whom many are part time until the November 17 deadline. ... Everyone I spoke with agreed: 'There is a lack of communication between NWA and DELTA. People manning the desks for our health care are not very well trained and it is frustrating for everyone'."

"1.) I did not receive the printed materials until well past the time they stated I would receive it in the Open Enrollment info. 2.) It contained basically no info on the contract AFA plan. 3.) The whole thing was handled so poorly and inadequately by Delta. Lots of confusion and misinformation put forth by the company."

"I received the 'glossy' info twice, however there was nothing on PPO B plan. The only way I was informed was from the AFA. Thank you."

"1.800.mydelta, knew nothing and were no help."

"was given NO info. about the "option B" plan."

"I received my Health care brochure today. It is titled "Your guide to Delta's 2010 Account-Based Healthcare Plan Options." Inside on page 2 near the bottom in small print, it states 'PPO Option B (which reflects the terms of the Northwest Medical Plan and is available only to employees covered by the AFA and IAM) will continue to be available for eligible [sic] employees. These plans are not discussed in this brochure.'"

As these complaints show, NWA flight attendants could not obtain meaningful information in order to compare the NWA health plan to the Delta plans. Truly, Delta failed to act in the interest of NWA flight attendants. A prudent fiduciary would expect questions from participants regarding how the plans compare. It would ensure that the plan representatives are educated with respect to all plan options. Delta's selective education and bias against the NWA option harmed the flight attendants represented by AFA.

As a plan fiduciary, Delta was required to act in the interest of all plan participants. As such, it should have provided the same level of information to all participants. Instead, Delta failed to provide meaningful information to AFA flight attendants. It concentrated on providing information on its own options and ignored the NWA option. This disregard for represented parties is not how an ERISA fiduciary should act. An ERISA fiduciary should expend the same level of effort with respect to all plan participants to ensure that they have meaningful access to information regarding their options.

B. Failure to adequately prepare for open enrollment

Preparing for open enrollment for a large health plan is a daunting task. This task is even more challenging when integrating two companies after a merger. After the Delta-NWA merger, Delta had approximately 75,000 employees. Tens of thousands of these employees are pre-merger NWA employees. Even if Delta and NWA had not merged, Delta would have required a large amount of time to effectively plan for open enrollment. Adding NWA health plans to the mix, the required preparation time would have been even longer.

It is our understanding that the need to plan for open enrollment was raised several times within Delta's benefits department in the spring and summer of 2009. Integrating the health plans of two large companies during open enrollment requires months of preparation

yet, it is our understanding that as late as August 2009, Delta had done nothing to prepare for the challenges that would arise by adding NWA health plans to the open enrollment process.

If Delta was not willing to expend the resources necessary to educate its employees handling the plan, it should have involved the pre-merger NWA benefits department. In response to an inquiry from an AFA representative addressed to Delta and NWA benefits representatives regarding open enrollment, the NWA benefits department responded on October 20, 2009, as follows:

NWA is not handling any part of the 2010 benefits. Delta has taken over all of the benefits, so if you have any questions about open enrollment you must contact Delta at 1800 My Delta. Delta should be mailing additional information about the plans they have. No one has received anything yet.

Delta's failure to adequately prepare for the open enrollment shows that Delta did not act prudently or in the interest of NWA flight attendants. Due to these failings, important open enrollment materials were provided late in the open enrollment window, forcing Delta to extend the open enrollment period. Delta grossly mishandled the whole process.

A prudent fiduciary would know that the integration of two Fortune 500 companies following a merger requires great time and effort. Also, a prudent fiduciary would realize that these challenges are amplified when trying to integrate health plans. NWA flight attendants would be given many new options with regard to health coverage. They would clearly want to compare the new options to the NWA option. A prudent fiduciary would expect questions from participants regarding how the options compare. By either failing to anticipate the tasks required for the open enrollment, or by recognizing what needed to be done and simply failing to do it, Delta failed to fulfill its fiduciary duties.

C. Delta's outsourcing of open enrollment functions

Delta relied heavily on outsourcing to contractors to execute the 2010 open enrollment. ERISA does not prohibit this, but Delta needed to exercise care in selecting and monitoring these contractors. Delta failed to do so, as noted by an AFA member:

"The person I spoke with on the phone when I called Delta re the above A/B [PPO options] situation said he worked for a contractor. Delta has contracted a company to answer all health ins. questions. He was fairly knowledgeable, but didn't know anything about A/B."

The bungled mailing of a Delta document entitled "Your Guide to Delta's 2010 Account-Based Healthcare Plan Options" ("Account-Based Guide") (a copy of which is attached to this memorandum as Exhibit C) shows one of Delta's failings in this area. This was intended to be

mailed in hardcopy to all Delta employees. Delta contracted out this work to another service provider. Delta failed to monitor this service provider, and it became clear that participants might not receive the information with enough time to make an enrollment decision. Delta therefore contracted with a new service provider to prepare the exact same information. The second service provider did not complete the project very far in advance of the first. Many reported receiving the exact same information twice within a two-day period.

Neither contractor was given any information about the union negotiated NWA plan, which is set out in the NWA flight attendant collective bargaining agreement. This one document that was mailed to each flight attendant, in fact, expressly withheld any information about the NWA PPO Plan. See the footnote on page 2 of the Account-Based Guide (Exhibit C), which states:

Note: ... PPO Option B (which reflects the terms of the Northwest Medical Plan and is available only to employees covered by the AFA) will continue to be available for eligible employees. These plans are not discussed in this brochure.

We believe this strongly supports the inference that Delta's intent was to steer employees into Delta's account-based plans, which of course are much less costly plans for Delta than the NWA Contract Plan.

Delta's outsourcing of essential functions and failure to ensure that these functions were properly performed evidences a lack of prudence on Delta's part. Many contractors hired to answer health plan questions did not even know about the PPO options. Important information that was supposed to be sent to Delta employees arrived dangerously close to the end of the open enrollment period, forcing Delta to extend the open enrollment window. Delta should have relied on Delta employees who were already familiar with the plans or ensured that any outsourced functions were properly performed.

D. Abundance of information regarding Delta account based plan options and relative lack of information regarding NWA option

The manner in which Delta operated the open enrollment shows a bias towards the Delta account-based plans, which are cheaper for Delta to operate. The materials provided to flight attendants are designed to entice pre-merger NWA flight attendants to drop their PPO Option B coverage in favor of Delta account-based plans. Delta's disregard for the NWA option shows that Delta wanted to steer participants to Delta plans in general and account-based in particular.

In the 2010 Open Enrollment Frequently Asked Questions for flight attendants, the first question is "[why would I consider the account based medical options offered by Delta instead

of PPO Option B offered under the AFA agreement?" The answer states that a participant's costs will be lower and the premiums will be cheaper under the account-based plans. The FAQs fail to ask and answer why a participant would choose to stay in the PPO Option B instead of switching to Delta account-based options.

Delta also added a PPO option ("PPO Option A") to its other options beginning in 2010. Notably, very few participants even knew of the existence of PPO Option A. Based on feedback from AFA members, many of the contractors hired to answer questions about Delta's options had little knowledge of PPO Option A. When choosing between health care options, people are most likely to choose the option for which they have the most information.

The Account-Based Guide also contained information regarding the new Delta PPO Option A. It contained no information regarding the PPO Option B. The brochure itself consists of 44 pages, and deals almost exclusively with account-based health care options.

Additionally, when describing PPO Option A, the Account-Based Guide describes it as "very similar to the Northwest Medical Plan." The Account-Based Guide provides absolutely no information about the former NWA plan and no comparison of benefits. Therefore, even though Delta did not prepare its contractors with knowledge to offer comparative information, Delta asserted that it was very similar to the NWA plan, no doubt in an attempt to persuade NWA flight attendants to switch.

One of FAQs for flight attendants asks "[w]hat options do other pre-merger Delta contract employees usually enroll in?" The answer: "This year, 94% of pilots and flight dispatchers chose to enroll in a Delta account-based medical option rather than the medical plan included in their contract." Given the abundance of marketing materials extolling the virtues of account-based plans, and the relative paucity of information regarding PPO options, it is little wonder that so many employees chose an account-based option.

The following are comments by participants noting the amount of material skewed in favor of choosing the account-based options:

"The NWA plan is referred to as "B". "B" as opposed to "A"??? I guess I missed something because no one has been able to tell me what plan "A" is, if it even exists. So I signed up for NWA plan "B". The price seems to reflect what I presently have under BCBS so I think I'll get what I asked for.

The person I spoke with on the phone when I called Delta re the above A/B situation said he worked for a contractor. Delta has contracted a company to answer all health ins. questions. He was fairly knowledgeable, but didn't know anything about A/B. If anyone out there can explain why there seems to be a B

plan without an A plan, please let me know. If the A plan is there & I have just missed it, please let me know where I can read about it."

"Delta's system had all the comparative cost but none at all for the other options such as PPO B. It was extremely obvious that Delta wanted to steer everyone to their level system."

"I received my Health care brochure today. It is titled "Your guide to Delta's 2010 Account-Based Healthcare Plan Options." Inside on page 2 near the bottom in small print, it states 'PPO Option B (which reflects the terms of the Northwest Medical Plan and is available only to employees covered by the AFA and IAM) will continue to be available for eligible [sic] employees. These plans are not discussed in this brochure.'"

Account-based options may not be the best choice for each participant. *Variety* requires that a fiduciary not mislead participants when it communicates with them. As a fiduciary, Delta had a duty to not mislead participants with regard to their benefit decisions. In order to act in the interest of all plan participants, Delta had a duty to present an objective assessment of each option and the type of employees that might benefit from each option. To provide participants with materials that only give the impression that an account-based option is the best option for each participant fails to satisfy the duty that Delta owed participants.

E. Inability to access meaningful information through Delta channels

AFA-represented participants had a very difficult time accessing information through the Delta benefits website and by phone. Many were placed on hold for over 30 minutes and countless participants were unable to navigate the complicated benefits website. The information was spread throughout the benefits website, and often required a participant to navigate through several links. Most disappointing of all, the reference materials, such SPDs, were far more difficult to locate than the "marketing" type materials.

Several of the problems highlighted by AFA members follow below:

"I'm happy to hear I was not alone in my efforts to be well-informed about all our options but kept running into block walls. My husband has been a cardiac patient for many years. Our financial survival is dependent on good health coverage. The "treasure hunting" that we had to do on the computer to gather all the information needed to make an educated decision, was utterly ludicrous. I am fortunate to be on a SLIP Leave. Had that not been the case, I don't know how I

ever would have found the time to get the answers I did. Having to jump back and forth from RADAR to all the other websites to try to gather information was very time-consuming and frustrating and way too reminiscent of trying to conquer HOT, IQ, and AQ."

"The 3rd time i called i wanted to know exactly what was and was not covered in both the gold and the plan b options... Fyi...i would never on my own been able to find it as it was under "forms" on the website – who looks there?"

"I received my information in the mail Nov. 15, 2009. Not a lot of time to look it over. I also called the 1800 my Delta and was called back the day AFTER enrollment. So they called the 18th of Nov. I had troubles with the website as not ONE doctor showed up for Alaska, so I had asked them about health care for Alaska and they told me to go to the website, I told them I tried that and nothing comes up, I was told it probably is something to do with MY computer. I got NO answers AT ALL."

"I'm writing to report an issue I had with 800-My Delta call center. I called on the last day (couldn't get through with my employee number the week prior) and understandably was on hold for over 30 minutes due to the call volume."

"I am writing to say that I have had a very concerning experience with the open enrollment. I tried for a week to get through to speak to someone and was on hold for endless hours. I then would get the "wrong" person, from retirees only, or whatever, after holding for all that time. I had questions that were never answered."

"I tried calling 1 800 MYDELTA and that was a very frustrating experience!!! I was trying to navigate through the phone choices for OVER 4 minutes. During that time I never reached a human being. Finally, the machine said" Sorry we do not recognize that number, please try again--Click (I was disconnected.)"

"The (Delta enrollment) web site was all but impossible to navigate."

"I was finally able to enroll by enlisting the aide [sic] of a dear friend who works in Human Resources as a manager in the insurance department, for another company. She found the website very difficult to navigate through--her comment "Our website is so easy compared to this one!!!!!!) I found the entire process to be very frustrating!!"

Delta's numerous failings cataloged in the sections above greatly exacerbated participants' inability to access meaningful information about their options. Delta representatives were not knowledgeable about the NWA option. Delta had not adequately prepared to ensure that the benefits website would be functional and navigable. In nearly all of its open enrollment materials, Delta touted the flexibility and choice its account-based plans would provide. In order to make a meaningful choice, a participant must be able to become informed. Delta's lack of attention prevented participants from obtaining what they needed in order to make an informed choice.

F. Misleading cost comparisons

Delta provided no meaningful cost comparison for the PPO Option B. The Account-Based Guide that was sent (twice) to all participants does not deal with PPO Option B. The chart on page 35 of the Account-Based Guide provides a chart showing the most and the least a participant in the Delta option would be expected to spend under each health care option. However, even though the chart demonstrates that Delta understood the usefulness of comparative information about participant options, Delta utterly failed to offer similar comparisons with the NWA option.

Delta provided AFA flight attendants with one sheet that provided a comparison of the NWA plan with **one** of Delta's account-based plans (the most popular account-based plan). Delta never provided participants with a meaningful way to compare costs between all of the Delta options and the NWA option, even though it did provide that with respect to its own options.

Additionally, Delta split the cost comparisons and benefit choices on the enrollment page into two pages, the first for account-based plans and the second for PPO plans. Due to this separated information, several participants reported that they did not even know they had a contractual PPO option, and had difficulty making a meaningful comparison between the account-based plans and the PPO plans.

As one participant noted:

"Delta's system had all the comparative cost but none at all for the other options such as PPO B. It was extremely obvious that Delta wanted to steer everyone to their level system."

Delta obviously failed to provide meaningful cost comparisons for represented participants. This is not how a fiduciary should act. Delta had a duty to act in the interest of NWA flight attendants. It should have shown the same level of care to the NWA flight attendants that it to those who had been pre-merger Delta employees.

Delta's actions fall far short of the standard set forth in *Varity*. When Delta decided to provide cost comparisons, it was required under *Varity* to present them in a fashion that would not mislead participants. The cost comparisons it did provide, along with the accompanying FAQs, indicated that participants would be better off enrolling in one of Delta's account-based plans. This may not be true for each participant, and Delta had a duty to provide objective information so that participants could meaningfully choose the best option for them. The favoritism shown towards Delta's account-based options at the expense of the NWA option is unbecoming an ERISA fiduciary.

G. Network coverage and transition of care issues

Prior to the merger, NWA participated in a national network of doctors through Blue Cross Blue Shield. Delta offers network coverage through United Healthcare, and the network transition did not go smoothly for AFA-represented flight attendants. There were significant gaps in the United Healthcare network that were not present in the Blue Cross Blue Shield network. This had a significant adverse affect on NWA flight attendants. Additionally, NWA flight attendants had difficulty obtaining information regarding United Healthcare's transition of care provisions. A sample of some of the issues encountered follow:

"I know UHC has a "transition of care" where one can continue to use their Doctors if a form is signed before the end of Jan.2010 requesting extension of a Doctors care for out of network Doctors. How long does "transition of care" last? I couldn't find this information anywhere. Calling the UHC rep. did not help as he was doing the same search as I was on the above mentioned web site."

"I looked up the providers in the United Healthcare Network. Discovered that not one of my regular doctors is in there data base (OBGYN, General Physician, Dermatologist, Allergy..) Not ONE! ... I don't understand why we are forced into a network in States where UHC is obviously not very prevalent."

"[N]ot ONE doctor showed up for Alaska."

“We live in the ann arbor area and none of our doctors or hospitals are in network. The university of michigan and st. Joseph's are not included. None of our Family doctors are either???. These are the two primary facilities in the area. The closest facility is over an hour away-not acceptable.”

“While searching doctors in www.uhc.com I find my physician under the UHC Choice Plus. When searching in myhealthcareview.com he does not show up under any Delta plan... only OOA. I am still not 100% sure that in network coverage will apply.

Why can't Delta and/or UHC put PPO Option B as one of the choices to search for physicians? How is one to know to search all these other plans and how will they know that they will be covered as in-network with PPO Option B?

Why can't Delta and/or UHC list ALL physicians by plan? Is there a way you know of to do this? It's too bad Delta could not keep it simple and have all this worked out before we started the enrollment process.”

Delta had authority to change the provider network; however, it needed to consider the interests of participants before doing so. The change in networks primarily impacted the NWA flight attendants. Delta failed to consider the issues these participants would face.

Also, once Delta decided to change the network, it had a duty to ensure that the transition went smoothly. As the quotes above indicate, participants were confused and frustrated with the change in provider network. 7/18/2010

Delta also made no effort to inform participants about United Healthcare's transition of care provisions. This is information that the average participant needs to know, but is unlikely to ask about. Countless participants simply assumed that their doctor could no longer be in the plan's provider network. Delta had a duty to inform these participants about United Healthcare's transition of care rules and the potential this granted participants to have their doctor be deemed an in-network doctor.

Delta failed in its duties as a fiduciary. A prudent fiduciary would realize that the average participant has very little experience dealing with provider network changes and transition of care issues. A prudent fiduciary would have provided adequate information to participants so that they could handle the transition in the fashion that best fit their needs.

H. Disregard of retirees

Delta was inadequately prepared to handle retiree medical issues. A representative of the AFA summarized the primary issues:

"NW retirees are having a lot of issues with their 2010 benefit enrollment information (or lack there of):

- 1. The letters that you sent to me a week or so ago that were to be sent to retirees have reportedly still not arrived at their homes*
- 2. Retirees (and others?) are defaulting to "no coverage"*
- 3. Retirees and active FAs are reporting they are having trouble changing their elections.*

Can we change our elections until the last day of enrollment?

- 4. Retirees report they are not able to make their life insurance and other elections during open enrollment*
- 5. Our contract provides coverage for retirees until the 1st day of the month that the retiree or spouse turns 65, [but one retiree was told that spouse would not be covered for a month and a half before he turned 65]."*

The same representative also wrote the following to Delta on November 12, 2009, five days before the open enrollment period for retirees was supposed to close:

"I keep hearing from worried and confused NWA FA retirees who have made many calls to Delta and feel they are not getting any information. There are continued issues with their options/VEBA rates/spouses, etc. and they continue to be told they will hear something in a few days or the following week. As November 17th draws closer, our retirees' concerns increase."

Another AFA representative sent the following message to inform retirees about the default coverage under open enrollment:

"I was in the enrollment page tonight to preview my retiree default coverage and to my surprise it shows that I default to "NO Coverage" if I don't enroll. That is a heavy penalty and if this is not a fluke on my account only, then we need to warn retirees to make SURE they enroll and also pass the word to everyone through the hotline."

Delta acknowledged that several issues affected retirees. This again shows that Delta was unprepared for the open enrollment. Retirees had an extremely difficult time obtaining correct information. Several of Delta's errors contravened the AFA collective bargaining agreement. Retirees had to rely on information provided by their labor representatives at the

AFA. Delta, a plan fiduciary, provided very little help at all. Delta did extend the open enrollment period for retirees, but this did not resolve the issues.

The plan participants should not have to rely on their bargaining representatives for information regarding employer health plans. The plan sponsor or administrator should have ready access to this information and should have been prepared to answer participant questions. Delta's lack of preparation and willful ignorance of the AFA contract provisions affecting retiree health care show that Delta did not act prudently and in the interest of NWA flight attendants.

I. Inaccurate online tool for estimating health coverage costs.

Delta's online tool to calculate prior year medical use was inaccurate for nearly all participants. An accurate calculator would have assisted participants in making an informed decision regarding which health care option to choose.

"I USED THIS TOOL AND FOUND IT TO BE WORTHLESS!!"

"When I went to the "calculator" tool it was very vague. There were no details of the claims that they say I had submitted as there should be if it truly accurate. Not to mention, some Sep-Oct expenses were not included as expected so I did not find it useful AT ALL."

This is yet another instance where participants could not obtain useful information that would help them in choosing between the many options offered under Delta's health plan. When Delta decided to provide this tool, as a plan fiduciary, it had a responsibility to ensure that it functioned properly.

V. TECHNICAL ERISA REQUIREMENTS

A. Provide participants and beneficiaries with Summary Plan Description ("SPD") and Summary of Material Modifications ("SMM")

Delta's materials on which participants were to make their choice of health plans were woefully inadequate for those purposes and, in many cases, utterly failed to meet ERISA's requirements regarding both form and substance.

ERISA requires the plan administrator to provide each participant with an SPD, in accordance with ERISA Section 104(b).²² The administrator must generally provide the SPD to participants within 90 days after they become participants in the plan.²³

When Delta and NWA merged, Delta became the plan administrator over a large group health plan that contained many different benefit options. NWA employees became participants in this newly created health plan and were thus entitled to receive SPDs within 90 days following the merger. Delta's own documents indicate that it administered a health plan with several options. The Account-Based Guide refers to an employee's "healthcare plan options". Additionally, the Account-Based Guide and the Benefit Guide refer to the pre-merger NWA health plan as "PPO Option B". Pre-merger NWA employees therefore became participants in the Delta health plan when the two companies merged. Yet Delta did not provide NWA employees with any SPDs that related to the pre-merger Delta health plan options. This is a violation of ERISA, for which the Department should take action against Delta.

If there is a material modification to any terms of the plan or a change in any of the information required to be included in the SPD, the administrator must provide an SMM or update of the changed information to plan participants within 210 days after the end of the plan year in which the change occurs.²⁴

The addition of PPO Option A and PPO Option B to the Delta health plan was material modification for which Delta should provide an SMM to participants. This SMM needs to be provided within 210 days following December 31, 2009, which is the end of the plan year. The 210th day is July 29, 2010, and to our knowledge, Delta has failed to provide any SMMs with regard to the new PPO options available under the plan.

B. Electronic Delivery of Documents

Delta relied extensively on participants having electronic access to plan information and open enrollment materials. The numerous functional and organizational failures on that website are described above. Under ERISA, if a plan administrator chooses to deliver SPDs, SMMs and certain other required documents through electronic delivery, it must comply with the strict requirements of ERISA. Delta did not even come close to complying with the electronic delivery regulations under 29 C.F.R. § 2520.104b-1(c).

In order to comply with ERISA, a plan administrator using electronic delivery must do the following:²⁵

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²⁴ ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1); *see also* ERISA § 102(a), 29 U.S.C. § 1022(a).

²⁵ 29 C.F.R. § 2520.104b-1(c)(1).

- (1) take appropriate measures to ensure that the system for furnishing documents results in actual receipt;
- (2) take appropriate measures to ensure that the system protects the confidentiality of the participant's accounts and benefits;
- (3) the electronically delivered documents are prepared and furnished in a manner that is consistent with the style, format and content requirements applicable to the document;
- (4) each participant receives notice, in electronic and non-electronic form, at the time the document is provided electronically, regarding the significance of the document, if it is not otherwise reasonably evident as transmitted;
- (5) each participant receives notice of the right to request and obtain a paper version of the document; and
- (6) upon request, the participant, beneficiary or other individual is furnished a paper version of the electronically provided documents.

Additionally, documents can only be provided electronically to participants satisfying the following criteria:²⁶

- (1) participants who
 - (a) have the ability to effectively access documents provided electronically at any location where the participant is reasonably expected to perform his or her duties as an employee; and
 - (b) with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of such employee's duties; **OR**
- (2) participants who
 - (a) have affirmatively consented, and not withdrawn such consent, to receive documents in electronic form;

²⁶ 29 C.F.R. § 2520.104b-1(c)(2).

- (b) in the case of documents to be provided through the Internet or other electronic communication network, have consented in a manner that shows their ability to access the electronically provided information;
- (c) have been provided, prior to consenting, a clear statement indicating (1) the types of documents to which the consent will apply; (2) that consent can be withdrawn at any time; (3) the procedures for withdrawing consent; (4) the right to request and obtain a paper version of an electronically furnished document; and (5) any hardware and software requirements for accessing and retaining the documents; and
- (d) after consent, if a change in hardware or software requirements creates a material risk that the participants will be unable to access electronically furnished documents:
 - (i) are provided with a statement of the revised requirements;
 - (ii) are given the right to withdraw consent without charge and without the imposition of any condition or consequence that was not disclosed at the time of the initial consent; and
 - (iii) again consents to the receipt of documents furnished electronically.

Based on our own experience and the information that we have received from our membership, no flight attendant has received a hard copy SPD for the Delta Plan. Delta seems to have ignored not only the specific requirements of the regulations, but also the general requirement that Delta as Plan Administrator must use measures reasonably calculated to ensure actual receipt of the material by Plan participants and beneficiaries, and that documents and information covered by ERISA Section 104(b) must be sent by a method or methods of distribution likely to result in full distribution.

The following email exchange demonstrates Delta's flagrant disregard for any of the legal requirements regarding distribution of SPDs. The MEC's President sent this email to the Delta Employee Service Center on October 19, 2009, just before the open enrollment period began:

I have accessed the Benefits Direct site and can only find outdated SPDs (or none for the PPO Option A and PPO Option B) for 2010 Benefits enrollment. I understand the 2008 SPDs for the HRA and HSA could carry over to the new year, but am not sure which SPDs are being used for the two PPO Options (non-contract Option A and AFA contract Option

B). When will these SPDs be provided? If they are already present somewhere, can you email the pdfs to me and direct me to the correct location on Deltanet?

This is the response she received on October 31, about halfway through the original open enrollment period:

Dear Mrs. Rook

Thank you for your recent email to the Delta Employee Service Center.

Unfortunately the only SPD on benefits direct is for the HRA and HSA plans, to find the SPD's for the PPO option A and B , please log onto the deltanet website. Also see attached brochures for the 2010 benefit enrollment which includes the SPD for the PPO option A and B. [Note: the brochures were in fact just brochures and do not qualify as SPDs.]

Should you have any additional questions or concerns regarding this or any other matter, please feel free to contact the Delta Employee Service Center.

We are here for you Monday-Friday / 8:00 am-5:00 pm (Eastern Time) by either dialing 1-800-MY DELTA (693-3582) or via email at esc.delta@delta.com.

Cordially,

Tiffany
(Emphasis added.)

As that email demonstrates, Delta's only attempt to deliver SPDs to participants was by providing links to them in the Benefit Guide. Providing links is an electronic delivery method and by these actions, Delta failed to comply with the electronic delivery regulations. Delta also failed to comply with the DOL regulations because it did not take any steps to ensure that providing links in the Benefit Guide would result in the actual receipt of the SPDs. Nor did Delta provide notice in both electronic and non-electronic form regarding the significance of the documents. Moreover, Delta did not provide notice in the Benefit Guide that participants had the right to request and obtain the electronically provided SPDs in paper form, which is one of the requirements for a proper electronic delivery system for such documents.

Additionally, participants to whom Delta attempted to electronically provide documents do not fit the criteria set forth in the regulations. It is a crucial fact that while flight attendants use computers in their work, the regular course of pre-merger NWA flight attendants' work does not require them to use the computer system used to access Delta health plan

communications and electronic communication is certainly not an integral part of flight attendant duties. As explained by the President of the MEC:

*DeltaNet is the electronic system that the flight attendants were told to use for open enrollment and to obtain copies of certain plan-related documents. **However, that system is not the same system that pre-merger Northwest flight attendants log in to when they report for work or when they perform other electronic aspects of their employment such as bidding for a line of flying.** (That electronic system is called RADAR or ATLAS). (Emphasis added.)*

By only making copies available on website, Delta is, in essence, making the copies passively available, much as many employers used to violate the requirement to “distribute” hard copies of SPDs by merely placing copies in a worksite (such as a break room). That was not acceptable under 29 C.F.R. §2520.104b-1(b) and the analogous passive electronic distribution by Delta is not acceptable in our circumstances. But that is what Delta is doing and what it will do for the 2011 open enrollment, unless the DOL intervenes.

Whether Delta’s approach is a conscious attempt to make it hard for flight attendants to compare Delta’s options with the NWA option, or whether Delta is merely sloppy in both its compliance and its website design, it was very difficult for flight attendants to find the SPDs on any Delta option except the Delta HRA and HAS options. Here is a statement by a member of the MEC regarding the experience of trying to locate the SPDs:

We never received PMDL SPDs in the mail. [Regarding Deltanet, the separate system that provides HR-type information, including benefit plan information,] most were not regularly using and were confounded by the maze that was Deltanet, although we had sign in access. I know I couldn't find PMNW SPDs on Deltanet during much of open enrollment on Deltanet and asked for them to be posted there before and during the enrollment period. I can't remember if the PMDL SPDs were on Deltanet, as that wasn't my focus. The PMNW SPDs remained on NWA's RADAR site until recently, but are now only accessed through "Benefits Direct" link on Deltanet. The PMDL plan SPDs are posted directly on Deltanet now with the below message (in order to find PMNW or more info, you have to go to the link to the external Benefits Direct site). To the left of the below message on Deltanet is the "SPD Updates" link below. It just links to the Guide they sent out [which is not an SPD]. The "Health Benefits" page on Deltanet doesn't even have any info about the PPOs that I can find, but a ton about HRAs/HSAs. To get info about other plans you have to go to Benefits Direct link.

Note the statement above that “The PMNW SPDs remained on NWA's RADAR site until recently, but are now only accessed through "Benefits Direct" link on Deltanet.” This may mean at least the NWA SPD was available on a computer system because the flight attendants had “the ability to effectively access documents provided electronically at any location where the

participant is reasonably expected to perform his or her duties as an employee; and with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of such employee's duties."²⁷ But of course the Delta SPDs were not on that site, making effective comparison of options difficult, if not practically impossible.

Now that Delta has removed the NWA SPD from the RADAR system, the pre-NWA flight attendants, who still use the RADAR system when performing their duties, are denied ready access to that document.²⁸ Given that SPDs are posted, to the extent they are posted at all, on DeltaNet, a completely different system, there is clear noncompliance. This means that currently, and presumably for the 2011 open enrollment, the situation is even worse than it was during the 2010 open enrollment period.

The extent of the guidance that the per-merger NWA employees received regarding access to plan materials, such as SPDs, prior to open enrollment was a September 10, 2009 letter from Rob Kight, Vice President (Compensation, Benefits and Services), which stated in relevant part:

How will I enroll? What if I am a pre-merger Northwest employee?

During 2010, we'll have a few different employee groups whose benefit options are based on their pre-merger carrier and whether or not representation has been resolved in their group. However, it is important to note that every benefit eligible employee will use Delta's benefit enrollment tool to make their benefit elections this year. The enrollment tool, called Benefits Direct, is available online on DeltaNet. Just log in to Employee Self-Service (ESS), and then choose Benefits Direct. To ensure you are familiar with how to access and navigate the system before Open Enrollment starts, there will be an online tutorial available on ESS in mid-October.

Therefore, under these circumstances, Delta has utterly failed to comply with the regulations regarding electronic distribution of the SPDs. It can only validly provide SPDs to these employees electronically if the employees consent. The facts show that Delta failed to obtain consent from any flight attendants before attempting to provide them with SPDs electronically. Delta's grossly inadequate efforts to deliver essential plan documents electronically falls short of the requirements set forth in the regulations, constitutes a failure to deliver SPDs, and is therefore a violation of the regulations.

²⁷ 29 C.F.R. § 2520.104b-1(c)(2)(i).

²⁸ See page 25, supra.

C. Provide participants with requested documents

Even if a plan administrator furnishes the SPD and other required documents to a participant in accordance with ERISA, the plan administrator must also provide participants with these documents when they request them. ERISA provides that “[t]he administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.”²⁹ The administrator may charge a reasonable fee for providing such document.³⁰

If the plan administrator fails to provide the request documents within thirty (30) days from the date of the request is subject to a civil penalty of \$110 per day after the 30-day period has ended.³¹ Each failure with respect to a separate participant is treated as a separate failure.³²

Due to Delta’s failure to provide SPDs and inadequate attempt to provide such documents electronically, many participants were driven to specifically request that Delta provide these documents. As stated previously, after the Delta-NWA merger, Delta became the administrator of an enormous health plan that contained multiple benefit options. Therefore, NWA flight attendants were participants in the Delta health plan and Delta was required under ERISA to provide SPDs to them upon their written request.

We believe that many flight attendants made requests to Delta for SPDs describing both the pre-merger Delta health plan options and the pre-merger NWA health plan. Delta repeatedly ignored these document requests. To our knowledge, Delta has not provided a single SPD to any NWA flight attendant that requested one. As discussed above, merely providing links to these documents on the company’s intranet is insufficient for purposes for ERISA. Due to Delta’s failure, it is subject to the penalties provided for in ERISA Section 502(c). The document requests were made in late 2009, so Delta’s 30-day window has passed. Perhaps the threat of penalty will induce Delta to fulfill its responsibilities as plan administrator.

²⁹ ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4).

³⁰ 29 C.F.R. § 2520.104b-30.

³¹ ERISA § 502(c), 29 U.S.C. § 1132(c).

³² *Id.*

D. Follow plan documents

ERISA plans must be “established and maintained pursuant to a written instrument.”³³ The legislative history of ERISA indicates that a written plan is required in order to ensure that every employee may, on examining the plan document, determine exactly what his rights and obligations are under the plan, and who is responsible for operating the plan.³⁴

The written plan requirements are so important to the purposes of ERISA that the statute offers several mechanisms through which a plan participant may enforce the written plan provisions. ERISA authorizes a plan participant to bring an action for the following purposes, among others:

1. to recover benefits due under the terms of the plan;³⁵
2. to enforce his or her rights under the terms of the plan;³⁶
3. to clarify his rights to future benefits under the terms of the plan;³⁷
4. to enjoin any act or practice that violates the terms of the plan;³⁸
5. to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of this title or the terms of the plan.³⁹

The NWA health plan was the product exhaustive negotiations between AFA representative and NWA. Over many, many years and through repeated collective bargaining agreements, NWA flight attendants made extensive concessions in other areas in order to attain for themselves high quality health benefits. In fact, the NWA health plan is almost unique among flight attendant plans because the entire plan is contained in AFA’s collective bargaining agreement.

³³ ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

³⁴ H.R. Conf. Rep. No. 1260, 93d Cong., 2d Sess. (1974).

³⁵ ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

³⁶ *Id.*

³⁷ *Id.*

³⁸ ERISA § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A).

³⁹ ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B).

As a result of the merger, Delta stepped into NWA's position as the contracting employer. Delta therefore has an obligation to follow the collective bargaining agreement. Because the collective bargaining agreement contains the entire NWA health plan, a violation of the contract terms is a violation of the written instrument governing the plan.

The section below details only a few of Delta's multitude of failures to abide by the collective bargaining agreement. Delta has continually refused to hold up its end of the contract. As a result, it has failed to act in accordance with the Plan's written instrument, and corrective action is required.

VI. FAILURE TO ABIDE BY COLLECTIVE BARGAINING AGREEMENT

Under ERISA, plan fiduciaries are obligated to act in accordance with the documents and instruments governing a plan. In a collective bargained plan, the applicable bargaining agreement constitutes such a document or instrument. Delta therefore has a fiduciary obligation to abide by the terms of the agreement.

Delta's actions with regard to the 2010 open enrollment show a complete disregard for the Plan participants that are represented by unions. Several of these violations are listed above. There are more instances in which Delta has disregarded the collective bargaining agreement. The circumstances described below present two of the situations in which Delta has failed to abide by the AFA collective bargaining agreement. And Delta clearly chose to ignore the agreement's provisions with regard to administration of the NWA health plan.

A. Provisions applicable when both participant and spouse are company employees

A section of the AFA agreement provides that "[w]hen a Flight Attendant and his/her spouse are both Company employees, the Flight Attendant has the opportunity to enroll as a participant in the Plan(s) or he/she may enroll as a dependent of another employee."

A former NWA flight attendant gave the following account, which shows that Delta violated this provision:

"I am a retired NWA flight attendant and it appears that Delta Airlines has in the words of one of their representatives "wiped out" my health care benefits for 2010.

When I went on the open enrollment website it wouldn't allow me to enroll. I contacted their representatives by telephone and they said I had been made a

dependant on my husbands insurance (he is a retired NWA pilot) and that they had wiped out my insurance.

I initiated a case file to find out why I no longer have health benefits in my own right. So far they have not responded and I am in the dark about my prospects for health insurance for 2010. My husband contacted ALPA and Delta Airlines about the fact that his option to cover me was at a cost substantially more than he is paying now, apparently because they did not know that his wife was another retired NWA employee. Since that time, the option to enroll me has been removed from his open enrollment screen.

Do you have any insight into what is happening or any suggestions as to what I can do to restore my health care insurance?"

This participant had a contractual right to choose whether or not to be a dependent on her husband's insurance or to be a participant as an AFA retiree. Delta simply ignored this provision of the agreement and automatically enrolled her as a dependent on her husband's insurance without her consent.

B. Survivor health coverage for domestic partners

The AFA contract provides for a Family Security Benefit, as follows:

*In the event of a Flight Attendant's death, benefits under the NWA Medical Plan and Prescription Drug Program and/or the NWA Dental Plan shall be continued for his/her **eligible dependent(s)** covered on that date, by the monthly advance payment of the applicable premium contribution amount, until the earliest of the following dates:*

- i. Remarriage of the surviving spouse, in which case the coverage for all family members terminates;*
- ii. The date an eligible dependent becomes eligible for Medicare (there is no continuation for an eligible dependent who is already eligible for Medicare at the time of the Flight Attendant's death);*
- iii. The date an eligible dependent ceases to qualify as an eligible dependent for any reason other than lack of primary support by the Flight Attendant;*
- iv. Two (2) years from the date of the Flight Attendant's death;*

*v. The date the **eligible dependent** fails to make a required premium contribution.*

The term “eligible dependent” includes domestic partners. Delta recently denied these benefits to a domestic partner. The facts indicate that the domestic partner satisfies the definition in the AFA contract, yet Delta refused to fulfill its contractual obligation to provide these benefits. It seems as though Delta only wants to administer the NWA option in the same fashion it administers its other options. This approach is inadequate because Delta consistently ignores the contractually mandated benefits that apply under the AFA agreement. As a fiduciary of the NWA health plan, Delta is required by ERISA to follow the documents and instruments governing the plan, insofar as they are consistent with ERISA. The provisions of the AFA agreement are consistent with ERISA and Delta is bound to act in accordance with them.

VII. CONCLUSION

Most of the issues surrounding the 2010 open enrollment are not self-correcting and the likelihood that they will occur again during the 2011 open enrollment period is very high. We respectfully request a meeting to discuss these violations in greater detail and to ensure that action will be taken to redress these violations and that Delta will in the future fulfill its fiduciary obligations with respect to union-represented plan participants.

Respectfully submitted:



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