VOL. 47, NO. 3 WINTER 2021

Employee Relations LAW JOURNAL

## ERISA Litigation

# The "Defensive" 401(k) Plan

*Jenna A. Bressel, Katherine M. Funderburg,*
*Matthew J. Renaud, and Joseph J. Torres*

No good deed goes unpunished. Those of us working with 401(k) plans are familiar with this sentiment. An employee benefit plan, as the name implies, is supposed to benefit employees. Yet benefit plans – particularly 401(k) plans – can be sources of aggravation for many. In addition to the threat of lawsuits, employers must also grapple with the difficulty of crafting lengthy, complex plans using language that is legally precise yet understandable to the average plan administrator.

While ERISA litigation has proliferated in recent years, with the Supreme Court issuing four ERISA decisions in 2020 alone,[1] the Court under the leadership of Chief Justice John Roberts has pointed plan sponsors toward a way to help control plan disputes. The Roberts Court's ERISA jurisprudence has re-awakened the idea that one of ERISA's key tenets is that a plan's written terms matter. In other words, if plan sponsors want to reduce their exposure to litigation, one way to do so is by adding certain plan terms that mitigate risk.

This column identifies some ways in which plan sponsors can amend plan language to manage and/or mitigate exposure to claims for benefits and other ERISA claims.

Jenna A. Bressel is an associate in Jenner & Block's Employee Benefits and Executive Compensation practice. Katherine M. Funderburg is a litigation associate at the firm. Matthew J. Renaud is a partner at the firm and is chair of its Employee Benefits and Executive Compensation practice. Joseph J. Torres is a partner at the firm and is chair of its ERISA litigation practice. Resident in the firm's office in Chicago, the authors may be reached at *jbressel@jenner.com*, *kfunderburg@jenner.com*, *mrenaud@jenner.com*, and *jtorres@jenner.com*, respectively.

## *Add a Limitations Period for Lawsuits or Arbitration Requests*

*Benefit claims limitations period*

Plan sponsors should consider including a provision limiting the time period during which a plan participant can bring a claim for benefits.[2] Because ERISA does not provide a statute of limitations (except for fiduciary breach claims),[3] federal courts generally apply the most analogous state-law limitations period.[4] This borrowed limitations period principally applies to denial of benefit claims brought under 29 U.S.C. § 1132(a)(1)(B).

This variance in state laws means that participants in the same plan may be subject to wildly varying limitations periods depending on where they bring their federal claim. In some instances, this means, for example, that a claim could be brought up to 10 years after the dispute giving rise to the lawsuit occurred. These differences across a plan population do not promote the certainty and uniformity that should be among the touchstones of prudent plan administration.[5]

However, there are steps a plan can take to promote a more uniform dispute resolution process. For example, a court will likely enforce a different limitations period that is contained in plan documents, as long as the contractual limitations period is not unreasonably short or otherwise foreclosed by a controlling statute. This was confirmed by the Supreme Court in its decision in *Heimeshoff v. Hartford Life & Accident Insurance Co.*[6] There, the Court considered whether ERISA permits parties to choose a limitations period by contract.[7] The Court concluded that because ERISA is silent regarding a statute of limitations, contractual limitations periods are permissible and courts must give effect to them unless they are unreasonably short.[8]

While endorsement of shorter limitation periods is a useful tool, it is important that plan administrators follow any applicable amendment procedures in adding such a provision. As the Supreme Court held in *CIGNA Corp. v. Amara*,[9] to be enforceable, requirements must be included in the governing plan document, as opposed to other plan materials such as a summary plan description or benefit communication.[10]

Nonetheless, while a limitations period must be included in the plan itself, as a best practice, plan sponsors should conspicuously include any plan-imposed limitations period in benefits determination letters, in addition to the summary plan description. And as discussed below, a clear record should be kept of participants' receipt of such plan communications.

*Fiduciary breach claims limitations period*

In addition to claims for benefits, many ERISA lawsuits allege breaches of fiduciary duties. From stock drop cases to complaints of excessive fees and/or plan investment options, the crux of these lawsuits is generally that the plan fiduciaries failed to disclose information to participants or act in the best interests of the plan and its participants.

Although 29 U.S.C. § 1113 provides a limitations period for fiduciary breach claims, courts have enforced limitations periods contained in plan documents that shorten the amount of time a participant has to bring such a claim. Under Section 1113, a claim must be brought "no later than" three years or six years, depending on the circumstances. This "no later than" language provides an opening to shorten the limitations period in the plan documents.[11] Given courts' willingness to allow these types of plan-based limitations, including a provision limiting the time in which a participant can bring a fiduciary breach claim may be worthwhile.

*Documentation of "actual knowledge"*

The length of a period of limitations may depend, in part, on whether the plan participant had actual knowledge of a fiduciary breach. ERISA provides for up to a six-year statute of limitations for a breach of fiduciary duty but shortens it to three years where the participant has "actual knowledge" of the breach. In a recent decision, the Supreme Court held that "actual knowledge" means the plaintiff "must in fact have become aware of [the] information," regardless of whether he or she had access to it.[12] In *Intel Corp. Inv. Policy Comm.*, the Court considered whether a plaintiff "necessarily has 'actual knowledge' of the information contained in disclosures that he receives but does not read or cannot recall reading."[13] The Court concluded that regardless of whether a plaintiff has information "close at hand," if he is not in fact aware of it, he does not have "actual knowledge."[14] Nonetheless, the Court in *Intel* did note that actual knowledge can be proven in the usual ways, including an admission by the plaintiff, or by circumstantial evidence, such as "electronic records showing that a plaintiff viewed the relevant disclosures and evidence suggesting that the plaintiff took action in response to the information contained in them."[15]

How this translates into real life has yet to be tested much, but a good start is a robust program of pop-up acknowledgements on a plan's web portal. For example, a plan might require participants' acknowledgement when accessing a particular document – such as a summary plan description, fund fact sheet, annual fee disclosure, or statement – that they have received and reviewed it. These acknowledgements may help a fiduciary prove actual knowledge in the future. However, the Supreme Court has yet to explicitly address the enforceability of limitations periods in plan documents that shorten the amount of time a participant has to bring a fiduciary breach claim, and what impact *Intel* will have on those plan-based limitations remains to be seen.

*General*

Plan sponsors should note that the limitations period must allow a plaintiff sufficient time to exhaust his administrative remedies (i.e., follow the plan's formal claims and appeals process), which is generally required before filing suit under ERISA.[16] Therefore, existing plan procedures should be carefully reviewed and coordinated with any shorter limitations periods, ensuring that a participant cannot argue that any flaws in the timing of the claims process renders the limitations period unenforceable.

## *Add a Venue Provision*

Where a plaintiff files a lawsuit can affect the outcome of a case. Some jurisdictions have a reputation for being plaintiff-friendly and while those generalities are often overblown, they may affect how a client or insurance company approaches settlement.

This risk of possible forum-shopping is particularly notable in the ERISA context because of the statute's plaintiff-friendly venue provision. Specifically, ERISA provides:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.[17]

Given this broad language, courts in general defer to a plaintiff's choice of venue, and are reluctant to transfer venue given the strong policy embodied in the foregoing language.[18]

Despite the foregoing, courts are trending toward enforcing venue-selection provisions in plan documents. In *In re Becker*,[19] a panel of the U.S. Court of Appeals for the Ninth Circuit denied a plaintiff's petition for writ of mandamus to cancel a district court's transfer order.[20] The plaintiff brought suit under ERISA in the U.S. District Court for the Northern District of California – the district in which she resided and where she had worked for the defendant.[21]

However, the defendant prevailed on a motion to transfer the case to the U.S. District Court for the District of Minnesota pursuant to its ERISA plan's forum selection clause.[22] The Ninth Circuit concluded that "[n]either ERISA's language and purpose nor precedent" barred the forum-selection clause and explained that forum-selection clauses in plan documents encourage uniformity in plan interpretations, which furthers ERISA's goals of lowering plan costs and offering low-cost plans.[23]

Similarly, in *Carlisle v. Board of Trustees of the American Federation of the New York State Teamsters Conference Pension & Retirement Fund*,[24] the court enforced a forum-selection clause, even though it was contained in a participation agreement to which the plaintiff was not a signatory.[25] The court found the clause enforceable, concluding that it was foreseeable that the plaintiff would be bound by the clause based on the text of the participation agreement and the summary plan description, which accurately summarized the clause.[26]

In general, it makes sense for a plan to limit venue to one of the three locations already set forth in the statute, but courts have held that the plan may restrict the venue to any venue that is considered reasonable. For example, in *Smith v. Aegon Cos. Pension Plan*,[27] the court reasoned that where a plan can avoid a venue by adding a mandatory arbitration clause, it may restrict venue to any reasonable location. The *Smith* court concluded that a forum selection clause in a plan is "not inconsistent" with ERISA because ERISA does not give participants a statutory right to select their preferred choice from among ERISA's venue options.[28]

While courts are willing to uphold such restrictions on where a lawsuit may be brought, participants are not without recourse to try and avoid such limits. For example, a plaintiff may challenge the reasonableness of the plan's venue, by questioning whether the designated venue would unfairly or ineffectively handle the lawsuit.[29] Relatedly, a plaintiff can argue that the venue is so inconvenient that it impedes the plaintiff's right to adequately access federal courts.[30] Plans therefore need to weigh the benefits of being able to limit where a suit may be filed, against such plaintiff-specific claims of unfairness.

In short, while the addition of a venue provision will not stop plaintiffs from filing lawsuits, it may prevent a plaintiffs' firm from bringing a lawsuit on its home turf or in a jurisdiction that is known for being friendly to the plaintiffs' bar.

## *Add an Arbitration Clause and Limitation on Class Actions*

Courts are split on the enforceability of arbitration provisions and class action waivers in ERISA-covered plans. Some courts have found such provisions enforceable, reasoning that when an individual elects to participate in a plan, he agrees to be bound by the provisions contained in the plan documents. For instance, in *Dorman v. Charles Schwab Corp.*,[31] the court upheld an arbitration provision and class action waiver in an ERISA plan. In so doing, the court explained that "[c]laims alleging a violation of a federal statute such as ERISA are generally arbitrable absent a 'contrary congressional command.'"[32] Because ERISA contains no such congressional command, the court noted, "every circuit to consider the question" has held that agreements to arbitrate ERISA claims are enforceable.[33]

On the flipside, however, other courts have declined to enforce such provisions. In *Smith v. Greatbanc Tr. Co.*,[34] the court declined to give effect to an arbitration clause, finding that there was no demonstration of an agreement to arbitrate.[35] The court concluded that merely participating in a plan does not demonstrate agreement to arbitrate ERISA claims arising under the plan.[36]

### *Best practices to consider in light of recent litigation surrounding plan management and fees*

401(k) fee lawsuits have challenged a variety of practices/arrangements, including payments to investment fund managers, investment administrators, recordkeepers, trustees, and service providers that offer some or all of these services.[37] Other claims assert that fiduciaries did not take advantage of the plan's size in negotiating for lower fee arrangements or soliciting bids for competing record keeping services.[38]

Plaintiffs bringing 401(k) fee claims have also alleged imprudent selection of fund options, investment styles, or account structures, as well as the imprudent selection of service providers and negotiation of fee arrangements.[39] Some have alleged that defendants failed to capture revenue streams because they failed to monitor or negotiate beneficial fee arrangements with regard to revenue-sharing, securities lending, float, and other practices.[40]

Plaintiffs have also attempted to bring claims regarding the management of 401(k) plans by asserting prohibited transactions under Section 406 of ERISA.[41] Plaintiffs may couple these claims with separate fiduciary breach claims asserting that defendants failed to disclose, or misrepresented the challenged practice.

Some of the plan characteristics that have been targeted in excessive-fee litigation include: accepting recordkeeping rates without attempting to bargain for lower fees; paying recordkeeping fees as a percentage of assets under management, rather than at a fixed, per-participant rate; failing to use the least expensive available mutual fund share class; failing to use separate accounts or collective investment trusts rather than mutual funds; offering too few (or too many investment options), or relatedly, offering investment options that are too risky or too conservative; failing to offer enough index funds; offering investment options affiliated with the record keeper; and offering investment options that underperform.

Importantly, to mitigate the risk of 401(k) plan fee litigation, plan sponsors should consider (i) establishing an investment committee to monitor plan investments and expenses, and ensure that funds are performing reasonably and in the best interests of plan participants; (ii) documenting and reviewing investment policies and procedures, and keeping plan documents in good form, readily available to share with participants; and (iii) reviewing service provider agreements, including trustee, recordkeeping, and investment manager agreements.

## *Conclusion*

Plan sponsors may wish to keep the above suggestions in mind as some "best practices" for drafting plan documents that mitigate the risk of costly, drawn-out litigation. By being intentional and taking the time up front to review plan documents and add recommended language, plan sponsors are more likely to set up the plan for success and make it easier for participants, plan administrators, and third parties to understand and abide by the plan's terms.

## *Notes*

1. *See Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474 (2020); *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020); *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020); *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2020).

2. For example, "An individual must commence a lawsuit involving plan claims no later than two years after the individual first receives information that constitutes a clear repudiation of the rights the individual is seeking to assert."

3. *See* 29 U.S.C. § 1113.

4. *See, e.g., Richardson-Roy v. Johnson*, 657 F. App'x 113, 115-16 (3d Cir. 2016) (applying a one-year limitations period under Delaware law); *Mirza v. Ins. Admin. of Am., Inc.*, 800 F.3d 129, 138 (3d Cir. 2015) (applying a six-year limitations period under New Jersey law); *Pilger v. Sweeney*, 725 F.3d 922, 926 (8th Cir. 2013) (applying a 10-year limitations period under Iowa law).

5. *See Hartenbower v. Elec. Specialties Co. Health Benefit Plan*, 977 F. Supp. 875, 883 (N.D. Ill. 1997) (recognizing that ERISA's policy promotes "uniformity, certainty and predictability for both plan beneficiaries and their trustees") (quotation marks and citation omitted).

6. *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 571 U.S. 99, 109 (2013).

7. *Id.* at 107.

8. *Id.* at 108-09.

9. *CIGNA Corp. v. Amara*, 563 U.S. 421, 437-38 (2011).

10. *See Tetreault v. Reliance Std. Life Ins. Co.*, 769 F.3d 49, 55-56 (1st Cir. 2014) (explaining that under *Amara*, summary plan descriptions do not constitute the terms of a plan).

11. *See, e.g., Hewitt v. W. & S. Fin. Grp. Flexible Benefits Plan*, No. 17-5862, 2018 WL 3064564, at *2 (6th Cir. April 18, 2018) (although ERISA provides a limitations period for fiduciary breach claims, a plan may specify a shorter limitations period; 29 U.S.C. § 1113

is not a "controlling statute to the contrary" because it provides only a default rule that permits parties to choose a shorter limitations period).

12. *Intel Corp. Inv. Policy Comm.*, 140 S. Ct. at 777.

13. *Id.* at 773.

14. *Id.* at 777.

15. *Id.* at 779.

16. *See, e.g., Fortier v. Hartford Life & Accident Ins. Co.*, 916 F.3d 74, 81 (1st Cir. 2019) ("In order to bring suit under a benefits plan subject to ERISA, a beneficiary must exhaust the plan's administrative remedies."); *see also Heimeshoff*, 571 U.S. at 105 (noting that "courts of appeals have uniformly required that participants exhaust internal review before bringing a claim [under ERISA] for judicial review").

17. 29 U.S.C. § 1132(e)(2).

18. *See, e.g., Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015) (affirming denial of motion to transfer venue because a plaintiff's "choice of venue is entitled to substantial weight" and "Congress intended in ERISA cases to give a plaintiff's choice of forum somewhat greater weight than would typically be the case, as evidenced by ERISA's liberal venue provision"); *Wallace v. Am. Petrofina, Inc.*, 659 F. Supp. 829, 831 (E.D. Tex. 1987) (upholding participant's choice of venue and explaining that courts must "bear in mind that the ERISA venue provisions have been motivated by a liberal congressional purpose, and must be construed accordingly").

19. *In re Becker*, 993 F.3d 731 (9th Cir. 2021).

20. *Id.* at 733.

21. *See In re Becker*, No. 20-72805 (9th Cir.), Dkt. 1-3, at 7-8.

22. *In re Becker*, 993 F.3d at 732.

23. *Id.* at 732-33.

24. *Carlisle v. Board of Trustees of the American Federation of the New York State Teamsters Conference Pension & Retirement Fund*, No. 20-cv-8793, 2021 WL 1512702 (S.D.N.Y. Apr. 16, 2021).

25. *Id.* at *1.

26. *Id.* at *4-5.

27. *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922 (6th Cir. 2014).

28. *Id.* at 931-33.

29. *See, e.g., Smith*, 769 F.3d at 930.

30. *See, e.g., Rodriguez v. PepsiCo Long Term Disability Plan*, 716 F. Supp. 2d 855, 861 (N.D. Cal. 2020).

31. *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019).

32. *Id.* at 513 (citation omitted).

33. *Id.* at 513-14.

34. In *Smith v. Greatbanc Tr. Co.*, No. 20 C 2350, 2020 WL 4926560 (N.D. Ill. Aug. 21, 2020), appeal filed, No. 20-2708 (7th Cir.).

35. *Id.* at *3.

36. *Id.*

37. *See, e.g., Hecker v. Deere & Co.*, 556 F.3d 575, 578 (7th Cir. 2009).

38. *See, e.g., George v. Kraft Foods Global, Inc.*, 641 F.3d 789, 798 (7th Cir. 2011).

39. *Id.* at 797.

40. *See, e.g., Tussey v. ABB, Inc.*, 746 F.3d 327, 331-32 (8th Cir. 2014); *Hecker*, 556 F.3d at 585.

41. *See, e.g., Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595-96 (8th Cir. 2009).