McDermott Will & Emery

ERISA PLAN CONTROVERSY:
RISING STAKES FOR THOSE UNPREPARED

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WHAT'S THE EXPOSURE?

- Settlements up to $140 million
- Last year alone, settlements of $17 million, $22 million, $24 million, among others
- Plaintiffs' lawyers generally get 1/3 of the settlement amounts
- Plaintiffs' lawyers seek not only money, but equitable relief in the form of changes to business practices
- Plaintiffs' lawyers have amassed a war chest from contingency fees and are looking for new targets

HOW DO THESE LAWSUITS GET FILED?

- Discovery in previous cases has given Plaintiffs' lawyers knowledge of industry practices
- Plaintiffs' lawyers "investigate" retirement plans with a view toward soliciting participants as plaintiffs for class action law suits
- Plaintiffs' lawyers use the internet, social media, television, radio and newspaper advertising
- Disgruntled employees are solicited in this way and call 800 numbers

MODUS OPERANDI OF PLAINTIFFS' LAWYERS

- Company or Plan administrator receives letter from participant or law firm representing participant
- Letter requests production of documents relating to the retirement plan within 30 days
- Document requests are extensive and some seek 6 years of records
- There is a $110 penalty per day under ERISA for untimely production of documents required to be produced by the statute

A GLIMMER OF HOPE: VICTORIES IN TWO RECENT TRIALS – THE NYU CASE

- ***Sacerdote v. New York University*** **-** alleging imprudence in the management of two New York University 403(b) plans
  - 403(b) is a retirement plan (similar to a 401(k) plan) for employees of certain governmental employers, hospitals, schools, churches and 501(c)(3) tax-exempt organizations
  - 1st claim: Committee overseeing plans imprudently managed the selection and monitoring of recordkeeping vendors resulting in excessively high fees
  - 2nd claim: Committee failed to remove certain objectively imprudent investment options resulting in losses
- Wave of cases filed against prominent universities and others over the last few years. NYU case is first trial verdict (victory for NYU)
  - Plan-related decisions are fact-based and unique to each plan
  - Committee members must understand their individual fiduciary obligations and obligations of the committee (they are not the same)
  - Cannot blindly rely on experts
  - Minutes are not a substitute for live testimony

A GLIMMER OF HOPE: VICTORIES IN TWO RECENT TRIALS – THE AMERICAN CENTURY CASE

- ***Wildman v. American Century Services, LLC***
  - Claims for breach of fiduciary duties of prudence, loyalty and monitoring in connection with 401(k) plan investment lineup that offered proprietary funds
  - *Process* followed by the fiduciaries is the key to defending these cases.
    - No breach of loyalty for maintaining 401(k) plan with only American Century proprietary funds where evidence showed careful investigations of investment decisions and subjective belief they were acting in best interests of participants.
    - "In evaluating whether a fiduciary has acted prudently, we therefore focus on the process by which it makes its decisions rather than the results of those decisions."
  - Process was well documented and showed appropriate investigations/monitoring.

WAYS TO MINIMIZE EXPOSURE TO LAWSUITS CHALLENGING FEES AND INVESTMENT SELECTION

- Document decision making process
  - Consider adopting a written investment policy and reviewing regularly
  - Keep thorough meeting minutes
- Review investment funds to determine if there is a lower-cost comparable option
  - If a more expensive option is chosen, document the reason why
  - Lower-cost funds may not be an option due to large minimum investment requirements
- Review history of service provider relationship and determine last RFP
  - DOL has indicated that it thinks sponsors should conduct RFP, or RFI, once every three years, signaling that it views frequent RFPs to be important
- Plan committee members should have frequent fiduciary training
  - Many organizations do this every 2-3 years, some annually
- Ultimately, key is to demonstrate a thoughtful, deliberative decision-making process

LAWSUIT RELATING TO COMPANY STOCK – IBM

- ***Jander v. Retirement Plans Committee of IBM***
  - IBM ESOP Plan primarily invested participant funds in common stock of participants' employer (IBM).
  - Allegation that IBM sold a significantly underperforming division that IBM had not previously publicly disclosed was having major problems. At time of spin-off, IBM disclosed the problem and took billions of dollars in pre-tax charge. IBM stock price dropped significantly as a result of public disclosure.
- Plaintiffs sued for breach of ERISA fiduciary duty under the theory that plan's fiduciaries knew that a division of the company was overvalued (thereby inflating IBM stock) but failed to disclose that fact.
- 2d Circuit becomes first Circuit Court to allow ERISA fiduciary-breach claims relating to stock drops of company stock funds since the Supreme Court decided *Dudenhoeffer*.

LAWSUITS RELATING TO ACTUARIAL EQUIVALENCE

- Cases challenging conversion of benefits and application of assumptions in defined benefit plans have recently been filed against American Airlines, Met Life, Pepsi, and US Bank.
- When defined benefit plan participants select an alternative benefit type, like joint and survivor annuity or early retirement benefit, Plans use assumptions to calculate current value of benefits, including using actuarial tables and interest rates. The IRS requires conversions to be actuarially equivalent.
- Plaintiffs allege that older mortality tables reduce benefits, which constitutes an unlawful divesting of benefits
- What are Plans doing in response?
  - Use of mortality tables is very complicated. Plans/actuaries should work with counsel and review if changing tables would affect all participants.
  - Document the review process and explain the results of different assumptions.

LAWSUITS AGAINST HEALTH AND WELFARE PLANS CHALLENGING FEES

- Challenges to health-plan fiduciary oversight and reasonableness in fees with allegations similar to those against fiduciaries of defined contribution retirement plans (like the 401(k) and 403(b) litigation).
- In ***Shore v. Atrium*** (W.D. Cal.), participants sued the Charlotte-Mecklenburg Hospital Authority("Atrium"). Plaintiffs alleged:
  - Participants were charged "far greater amounts" than they would be under other available managed care networks.
  - Participants were subject to higher deductibles and co-insurance amounts than they would be under comparable providers.
- Takeaways:
  - H&W plans are not exempt from fee litigation—fiduciaries must be able to demonstrate prudent decision-making and oversight of fees.
  - In a 2015 publication entitled **Understanding Your Fiduciary Responsibilities Under a Group Health Plan** the Employee Benefits Security Administration of the Department of Labor took the position that health-plan fiduciaries need to monitor fees similar to the way retirement plan fees are monitored.
  - This case will address how fees are assessed in health plans, whether it's possible to compare one network to another, and how deeply fiduciaries must dive into fees when overseeing a plan.

LAWSUIT RELATING TO REDUCTION IN EMPLOYEE HOURS TO AVOID THE AFFORDALE CARE ACT

- ***Marin v. Dave & Busters, Inc.***
  - Lawsuit alleging D&B reduced employees hours to avoid ACA mandate to provide health care to full-time employees
- Tried to settle in early 2018 for $7.425 million
  - Court rejected settlement
- D&B to try again at court approval of new settlement
- Case alleged violation of ERISA 510 by cutting employee hours to avoid ACA mandate

2019 – ERISA ISSUES WE ARE WATCHING

- Venue/Forum Selection Clauses in Plan documents
- Arbitration agreements and impact on fiduciary duty claims
- Statute of limitations
- Burden of Proof issues

2019 – ERISA ISSUES WE ARE WATCHING FORUM SELECTION CLAUSES IN ERISA PLANS

- ERISA, 29 U.S.C. § 1132(e)(2): ERISA case may be filed in the district (1) where plan is administered; (2) where breach took place; or (3) where a defendant resides or may be found. Plaintiff can choose any of those.
- ***In re Mathis*** (7th Cir.):
  - Plaintiff filed lawsuit in E.D. Pa. against Caterpillar LTD Plan.
  - Plan required lawsuits to be filed in C.D. Ill., where the Plan was administered.
  - District court held that § 1132(e)(2) was permissive language that did not preclude the parties from contracting in the Plan for forum.
  - Seventh Circuit agreed, affirmed the motion to transfer forum to Illinois.
  - The Supreme Court denied cert in January 2018.
- Ideal language would be something like: "Any court action to (a) recover plan benefits or (b) enforce or clarify rights under Section 502 of ERISA must be brought in the U.S. District for [insert district of choice, such as Central District of California] where the plan is administered."

2019 – ERISA ISSUES WE ARE WATCHING ARBITRATION AND CLASS ACTION WAIVERS

- ***Epic Systems Corp. v. Lewis* (2018)**
  - Employers may require employees to sign arbitration agreements providing for individualized arbitrations and waiving class actions. Not an ERISA case, but does allow employees to sign enforceable arbitration agreements. Waiting to see impact on ERISA fiduciary duty cases.
- ***Munro v. University of Southern California*** (9th Cir. 2018)
  - Declined to compel arbitration of ERISA breach of fiduciary case for excessive plan fees because claim was brought "on behalf of the Plan" under ERISA 502(a)(2) and not individually by the plaintiff who signed the arbitration agreement in connection with employment. Court held the "Plan" had not agreed to arbitrate (Plan documents were silent on arbitration). Petition for writ of cert. to Supreme Court filed Nov. 29, 2018.
- ***Dorman v. The Charles Schwab Corp.*** (2018)
  - Court declined to enforce arbitration agreement on breach of fiduciary duty claim even though Plan document required it ("Any claim, dispute or breach arise out of or in any way related to the Plan shall be settled by biding arbitration."). But Plan with language was adopted after plaintiff had ceased participating but before sued. Implied that if plaintiff had been active participant with Plan language in effect, then arbitration would have been compelled.
- Unclear if provides any relief to DOL regulation at 29 C.F.R. § 2560.503-1(c)(4) prohibiting mandatory binding arbitration in lieu of court review for adverse health plan denials.

2019 – ERISA ISSUES WE ARE WATCHING STATUTES OF LIMITATIONS/REPOSE

- ERISA § 413, 29 USC § 1113, statute of limitations for ERISA breach of fiduciary duty claims
  - Absent fraud or concealment, an ERISA breach of fiduciary duty claim must be brought before the earlier of: (1) within six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation; or (2) three years after the earliest date on which the plaintiff had "**actual knowledge**" of the breach or violation.
  - Six year statute – ***Fuller v. Suntrust Banks*** (N.D. Ga. 2018)
    - Not subject to equitable tolling. Fact that administrative claim process (which plaintiff argued was a prerequisite to bring the lawsuit) took 336 days to resolve did not relieve plaintiff of requirement to file lawsuit within six years of alleged breach.
  - Three year statute of limitations - ***Sulyma v. Intel*** (9th Cir. Nov. 2018)
    - "Actual knowledge" means just that – actual not constructive knowledge by way of plan disclosures that were not read.
    - Do Plans now need to require participants to sign acknowledgement that they "read" disclosures provided to them?
- Contrast with statutes of limitations for benefit claims
  - No ERISA provisions setting statute of limitations in challenging denial of benefits (so default to state law equivalent for similar claims).
  - Supreme Court held in ***Heimeshoff*** that Plans may build in contractual limitation periods for benefit claims. While no automatic tolling for administrative claims process, equitable tolling could be necessary of contractual period if administrator caused participant to miss deadline.

2019 – ERISA ISSUES WE ARE WATCHING
BURDEN OF PROOF ON LOSS CAUSATION

- ***Brotherson v. Putnam*** (1st Cir. 2018).
  - At trial, *Brotherson* plaintiff had proved a failure to monitor plan investments. Trial judge granted judgment to the defendant on the breach of the duty of prudence because plaintiff failed to offer evidence that the breach caused harm. First Circuit overturned and held that defendants have the burden to negate a causal link between the fiduciary's breach and the alleged harm.
  - First Circuit solidified circuit split.
    - 1st, 4th, 5th, 8th Circuits hold that once a plaintiff demonstrates a a fiduciary breach, the defendant has the burden to negate loss causation.
    - 6th, 9th, 10th and 11th Circuits have held that the plaintiff bears the burden of the elements of the case, including loss causation.