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# CONFERO

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# ERISA Litigation: A Look Around the Bend

By Alan Hahn and William B. Szanzer

Employee benefit plan sponsors are adept at keeping one eye on the present and another on the future. This may be because decisions relating to employee benefit plans often take many months of advance planning to implement. As a result, predicting the future, and the change that it can bring, is a necessary part of being a good employee benefits professional and plan fiduciary. Among the changes that plan fiduciaries must consider as they manage their plans are those that affect the workforce, changes in investment markets and regulatory changes. Often overlooked, however, is keeping a trained eye on trends affecting employee benefit plan litigation. For instance, in regard to retirement plans, plan fiduciaries may be under the impression that litigation has primarily taken the form of excessive fees and stock drop litigation, and plan sponsors have been able, in many cases, to defend such lawsuits. While this may be true to some extent, plan fiduciaries should have a clear sense of what recent case law has shown to be the latest plaintiffs' theories of liability and the best ways to defend a benefit plan lawsuit. Additionally, plan sponsors need to understand what areas of plan management are ripe for employee benefits litigation in the future. Employee benefits litigation has always been a factor to consider as long as employee benefit plans have been in existence, but the risk of litigation for every plan sponsor has never been higher.

Part of the reason plan fiduciaries may not be completely ready for a litigation involving their plans is that many plan committees have developed protocols for handling a change in legislation or regulation that impacts their plans—for example, their quarterly benefit committee meetings provide a forum for reviewing changes in law, and upon hearing the announcement from the governmental or regulatory authority about the upcoming change, they then adopt the necessary amendments and operational changes to be in compliance with the new guidance. The announcement acts as a call to action for the plan sponsor and sometimes even includes the exact steps required for the plan sponsors to take to be compliant. This means that the plan sponsor is alerted that it must take certain steps to be compliant with the latest change and they will know to engage counsel to provide assistance.

By contrast, many plan fiduciaries find it much more difficult to keep up with the ever-changing world of employee benefits litigation. Many times there is no call to action until the plan sponsor is already named a defendant. The disputes can come from different sources, i.e., from employees regarding their benefits or from vendors and third-party administrators regarding a contract dispute. The uncertainty of when and who may bring a lawsuit makes it difficult for plan sponsors to stay ahead of employee benefits litigation trends. Because employee benefits litigation is increasing, it is essential for a plan sponsor to assess its plans for the risk of becoming involved in a dispute. Allocating a portion of every committee meeting to the topic of employee benefits litigation may be a good way to spark an idea or provide for a change in practice that could, one day, save you from liability in the future.

In order to help alleviate the risk of litigation, plan fiduciaries should consider the latest trends in employee benefits litigation, including the following items, when evaluating their plans:

1 ***Understand you may be a target.*** In the retirement plan space, the long bull market has ensured that retirement plan assets have never been larger. Additionally, thanks to the widespread practice of auto-enrollment (and auto increase), there are more people in more plans with larger account balances per participant than ever before. If your plan has grown and you have not taken steps to upgrade your fiduciary and operational compliance, your plan may be at risk of a lawsuit. At the same time, plaintiffs' lawyers have expanded their focus on bringing lawsuits against smaller and midsize plans, including by bringing claims that were previously only common to plans of larger size. Additionally, as plans have grown, mistakes in plan administration can result in significant penalties should the IRS or DOL identify these issues on audit, especially if the IRS takes into account the size of a plan in assessing penalties. While there are market forces at work compressing investment management and recordkeeping fees, plan sponsors may be paying more than they have to, exposing them to litigation risk.

2 ***New theories of liability.*** Plaintiffs' lawyers and IRS auditors have sharpened their focus on new theories of liability. One theory of liability looks at changes in plan administration as an indication that there may have been problems earlier. Other areas to keep an eye on include (i) litigation involving target-date funds; (ii) theories of liability based on inartfully crafted employee communication materials (which need to be reviewed before distributed to reduce the chances of a future dispute); (iii) the payment of plan expenses from plan assets; and (iv) conflicts of interest involving service providers. In addition to these theories of liability, prudent plan sponsors should be reviewing whether the new DOL fiduciary rule makes things riskier for their plans.

3 ***Vendors may be adversarial to you in a lawsuit.*** Your third-party administrator is charged with handling important tasks for you. As a result, it is important to make sure that your service agreements with your vendors have been appropriately negotiated, and not just for an appropriate level of fees. Too often, plan sponsors with long-standing vendor relationships fail to revisit their service-agreement language and simply roll over from year to year with an updated fee agreement at best. This is particularly true in regard to health plans, but can be the case with retirement plans as well. All agreements should be reviewed prior to their renewal to make sure they accurately reflect the plan sponsor's current needs and expectations. Consider reporting your plan's indemnification rights against your service providers to your fiduciary committee so they are in the know before a lawsuit is brought, and upgrade those provisions as necessary.

4 ***Plan document requests.*** When a plan sponsor receives a request for plan documents from a participant exercising his ERISA rights, the plan sponsor should have a protocol in place to send the appropriate documents to the participant. These documents may include the official plan document and amendments, IRS Forms 5500, and summary plan description (SPD). Plan sponsors that do not have a protocol in place can easily find themselves sending plan documents well after the 30-days deadline, which may result in penalties (currently $110/day). We find, especially in regard to health plans, that third-party administrators and insurers expect their customers to handle document requests. Don't get caught without an updated set of plan documents.

5 ***Compliance review.*** One of the best ways to avoid employee benefits litigation is to conduct a compliance review. From an operational perspective, many matters revolve around a plan sponsor not applying its retirement plan's definition for compensation, eligibility, and service crediting correctly. These terms should be clearly defined in the plan document.

6 ***Beneficial clauses in your plan documents.*** Because of recent case law, many plan sponsors may want to include a venue-selection clause in plan documents to allow the plan sponsor to handle a matter in its home jurisdiction. Another helpful provision that may be included is a provision that limits how long participants have to bring a lawsuit. These provisions, and others, have been upheld by courts and can stop many matters from proceeding to litigation.

7 ***Insurance considerations.*** Any review of employee benefits litigation readiness must include a full review of your ERISA fiduciary liability insurance policy and bond (Note that these are two different things.) Are the limits and deductibles appropriate? Have there been corporate changes that should be taken into account? These questions and more should be addressed with your insurance broker.

Employee benefits litigation is a fast-moving, expanding area of concern for plan sponsors. Your ERISA lawyer can help you follow litigation trends and keep you a step ahead of the game. Plan sponsors should not wait to be named in a lawsuit before reviewing their plans for exposure to employee benefits litigation.

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