

36TH ANNUAL ISCEBS

Symposium

401(k) Lawsuits on the Rise: Best Practices for Plan Fiduciaries

Todd Solomon

Partner, McDermott Will & Emery LLP

Chicago, Illinois

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Agenda for Today

- Overview of ERISA fiduciary duties
- Overview of recent cases and activity
- Best practices for fiduciaries
- Lessons / Takeaways

Why This Matters?

- Retirement plan litigation is big business for Plaintiffs' lawyers.
- Claims, even if sometimes relatively baseless, are very difficult to dismiss early in litigation because claims are so factual in nature.
- Most defendants settle; lawyers get 1/3.
- Plan fiduciaries are typically loyal company employees and do not want to be involved in lawsuits/deposed.
- Bad publicity for these types of suits.

Fiduciary Responsibilities

- *The responsibilities of plan fiduciaries include:*
 - Acting solely in the interest of plan participants and their beneficiaries
 - Carrying out their duties prudently
 - Following the plan documents (unless inconsistent with ERISA)
 - Diversifying plan investments
 - Paying only reasonable expenses

Potential Consequences of Breaching Fiduciary Responsibilities

- Personal liability for losses
- Additional equitable or remedial relief
- Becoming barred from future fiduciary service
- Additional 20% civil penalty under ERISA Section 502(I)
- Liability Mitigation: Most companies want a clear delegation to take the BOD out of harm's way. Clear delegations and charters are critical.
 - The Bottom Line: Avoiding fiduciary liability requires that a fiduciary engage in a prudent and deliberative decision making process, and document the process thoroughly – fiduciaries are judged according to the procedural process they undertake.

Recent Developments

- Fee litigation:
 - Suits against smaller plans
 - University and Health System 403(b) plan class actions
 - Cases against large employers are on the rise

SMALLER 401(k) PLANS

Small Plans are Not Immune

- Excessive fee litigation has typically focused on larger plans.
- But recently, cases have been filed against 401(k) plans/record keepers for plans with significantly fewer participants and assets:
 - *Damberg v. LaMettry's Collision, Inc.* (D. Minn.): \$9 million in assets and 114 participants.
 - Voluntarily dismissed by plaintiffs on June 17, 2016.
 - *Bernaola v. Checksmart Financial LLC* (S.D. Ohio): \$25 million in assets and 1,700 participants.
 - Filed on July 14, 2016, outcome pending.

403(b) CASES

Typical Allegations

- In August 2016, several class action lawsuits were filed against prominent universities for their 403(b) plans, including Yale, MIT, NYU, Northwestern, Johns Hopkins, Vanderbilt, and Duke, among others.
- Generally include the same allegations:
 - Defendants' actions caused participants to pay excessive administrative and recordkeeping fees.
 - Defendants imprudently offered higher-cost investments where lower-cost investments were available (Failure to use your leverage!)
 - Plans offered duplicative investment options, diluting ability to pay lower fees and confusing participants. Some offered 100's of funds with multiple recordkeepers.
 - Defendants imprudently retained historically underperforming plan investments.
 - Defendants engaged in prohibited transactions related to excessive fees.
- "Billion-dollar-defined contribution plans [...] have tremendous bargaining power to demand low-cost administrative and investment management services."

Excessive Fee Litigation Going Strong in 2017

- Other suits challenging 401(k) plan fees have had notable success in recent months.
- Judges have denied motions to dismiss proposed class actions against:
 - BB&T Corporation (M.D.N.C.)
 - Allianz Asset Management of America (C.D. Cal.)
 - Putnam Investments LLC (D. Mass.)
 - Deutsche Bank (S.D.N.Y.)
 - Franklin Resources, Inc. (N.D. Cal.)
 - Edward D. Jones & Co. (E.D. Mo.)
 - Oracle Corporation (D. Colo.)
 - Safeway, Inc. (N.D. Cal.)
 - Anthem Inc. (S.D. Ind.)
 - Nationwide (S.D. Ohio)

Notable Cases/Settlements

- *Kruger v. Novant Health, Inc.* (M.D.N.C.)
 - Settled for \$32 million on September 9, 2016.
- *Meiners v. Wells Fargo & Co.* (D. Minn.)
 - Dismissed in favor of Wells Fargo on May 25, 2017.
 - Rare win for defendant in 401(k) fee litigation.
 - Court: Wells Fargo can't be held liable for failing to choose the cheapest fund, and plaintiffs did not provide a benchmark against which Wells Fargo's funds could be meaningfully compared.
- *In re Northrop Grumman Corp. ERISA Litigation* (C.D. Cal.)
 - Settled for \$16.8 million on June 12, 2017.
- Employer stock presents special challenges
 - “Stock drop” and “reverse stock drop” cases are still prevalent.
 - Many plan fiduciaries engage independent fiduciaries to help mitigate this risk and manage employer stock funds for them.
 - Pros – liability protection/co-fiduciary
 - Cons – loss of control, cost, clunky to explain to participants

Best Practices for Fiduciaries

- Duty to Monitor: Rigorously monitor and periodically reassess investment management and recordkeeping fees to ensure they are reasonable.
 - Consider options such as fee leveling and elimination of revenue sharing.
- Document the Process: Follow sound governance procedures and have a well-documented process for making fiduciary decisions.
 - Keep written minutes and investment policy statements to show how fiduciaries consider quality, service, and price when selecting monitoring investment options.
- Use Advisors: Understand the advice, and ask questions, of qualified, independent advisors.

Service Providers

- Responsible plan fiduciaries should understand the roles of each service provider, the array of services they provide and how they are compensated for those services.
- Documentation
 - 408(b)(2) disclosures – discuss at regular meetings
 - Comparisons of service provider features, costs and breadth of investment offering
 - Fee benchmarking reports
 - Information regarding competitive bidding

Lessons

- Meet regularly / document the process!
- Address underperforming funds quickly.
- Adopt an investment policy statement and follow it.
- Adopt good governance: delegations, charters, minutes, etc.
- Review vendors periodically and conduct an RFP for lower fees.
- Engage a qualified, independent advisor and pay reasonable fees.
- Consider elimination of revenue sharing.
- Make sure you are in the lowest share class.
- Take claims/inquiries seriously – follow the ERISA claims procedure.