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

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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(l)
- 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.
    • 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.)**
  – 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.