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ERISA Claims: How Can Benefits Be An Employer’s Burden?

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Jackson Lewis P.C. · ERISA Claims: How Can Benefits Be An Employer’s Burden?

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Takeaways

Employers should develop and implement compliant and risk adverse ERISA benefit plans and fiduciaries must administer those plans in accordance with ERISA. However, the plaintiff’s bar will still search for loopholes and file litigation. Investment performance and fees, recordkeeping fees, COBRA litigation and healthcare claims are only a few of the issues facing employers in 2021.

What Employers Should Know

- There was an unprecedented uptick in ERISA litigation in 2020 with approximately 100 cases filed against 401(k) and 403(b) plans, defined contribution plans, sponsors and fiduciaries.
- To best mitigate risk, employers should:
  - Conduct frequent fiduciary meetings with detailed minutes, training and periodic requests for information and production and training to ensure prudent levels of compliance with respect to your investments and fees;
  - Ensure that fiduciaries understand the importance of their role and are invested in their job;
  - Continually review and benchmark investments and fees;
  - Heed advice from industry consultants and professionals;
  - Stay up to date on industry trends and the law;
- How are plaintiff’s counsel finding and targeting an organization’s plan?
  - Corporate tax returns are public and reveal vulnerable areas
    - Assets under management
    - Global expense reporting

Hosts

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Practices

Employee Benefits
ERISA Complex Litigation

    - Target-date funds
- Plaintiff's counsel increasingly find plaintiffs via social media.
- ERISA claims usually start with reporting or disclosure requests. Be responsive to these inquiries to better head off potential litigation.
- A good defense to ERISA claims starts with:
    - Detailed committee notes; and
    - Documentation of processes, compliance efforts and benchmarking.

COBRA litigation also continues to rise. Claims typically allege technical violations of ERISA regulations for failure to specifically follow the DOL model notice, even though the law does not require employers to do so. Employers need to be aware of what their COBRA notice says to avoid steep penalties

Transcript

Alitia (00:06):

Welcome to Jackson Lewis' podcast, We get work™, focused solely on workplace issues everywhere and under any circumstances. It is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace in it's continuing evolution and helps answer the question on every employer's mind. How will my business be impacted? Employers can and should develop and implement the most compliant and risk adverse benefits plans. But the plaintiff's bar will still search for loopholes, investment fees and loss, COBRA litigation, and healthcare claims are only a few of the issues facing employers in 2021. This episode of We Get Work explores the most significant ERISA litigation issues today and provides information and guidance on how to identify problems before they arise, and hopefully keep the benefits wolves at bay.

Our host for today's episode of We get work™ are Stacey Cerrone and Howard Shapiro, principals in the New Orleans office of Jackson Lewis, Stacey and Howard defend clients against complex ERISA class actions, where the stakes are high. And there was often a real and immediate impact for employers, employer plans, plan fiduciaries, planned third-party service providers, and employees, no matter the outcome. Stacey and Howard, the question on everyone's mind today is how can employers prepare and protect against the proliferation of ERISA claims in class actions? And if an ERISA class action is filed, how will my business be impacted?

Howard (01:53):

Well, the impact on everybody's business is considerable because if you are unlucky enough to be targeted by one of these persistent plaintiff counsel, you're going to end up defending a really huge piece of class litigation. But Stacey, before we get to the litigation itself, let's talk about the activity we've seen in 2020, which is truly unprecedented in my history defending these kinds of cases.

Stacey (02:33):

I agree, Howard, we have seen approximately 100 cases filed in 2020, and these cases have been filed against 401(k) and 403(b), defined contribution plans, sponsors, and fiduciaries. And what they have alleged is, or what plaintiffs have alleged, is that these plan fiduciaries and these plans suffered losses because their investment performance was poor. Their investment fees were too high and their record keeping fees were too high.

Howard (03:17):

So when we're talking about 403(b) plans, of course, we mean plans for non-profit employers like universities. When we're talking about 401(k) plans. We're talking about plans for for-profit entities. And the kinds of cases that are being brought just as a broad side attack on every facet of the expense of these plans. So for instance, it costs money to do record-keeping in a plan. Think of all the individual account balances that have to be kept up with when I change my money from one fund to another fund, somebody's got to keep up with all the computer work and the bookkeeping to figure out when I changed my money, how much I've gained or lost. And that bookkeeping, that record keeping, that costs money. Other charges also occur, Stacey, in the context of maintaining plans, can you give us a few examples of those?

Stacey (04:38):

Of course. It costs a considerable amount of money to comply with all of the disclosure requirements to participants. Record keepers and plan sponsors need to continually and continuously communicate with their participants, and that is an incredibly expensive endeavor.

Howard (04:59):

And of course, somebody has to pay for that, that costs money. It does not happen for free. So the whole attack in these cases is whatever administrative fee costs exists to run these plans. And these plans are like little corporations, the plaintiff's broadside complain, it's costing too much. And by the way, using my powers of hindsight analysis as super plaintiff fiduciary, if you would only use this fund, which I'm telling you five or six years later after you made the investment choice, if you had only used this fund, you could have saved $20 million worth of fees. So that's the kind of attack that our clients are getting. Stacey, what can our clients do to position themselves to be able to deal with these very unfair attacks?

Stacey (06:17):

So just because there have been these huge volume of cases, that doesn't mean that all of the plan fiduciaries in these cases are improved. So, what can you do to try and mitigate your risk? Well, it's essential that you make sure that you have your meetings as often as you are supposed to have them. Quarterly, if not more. You have to continually review and benchmark all of your investments and all of your fees. Howard, what else can you do?

Howard (06:57):

Well, it's important that the committee members, and the focus here is on the fiduciary committee members. These committee members have to be really, for lack of a better word, they just got to be dedicated to doing a great job. They have to be invested in doing a great job. They have to remember at all times, even though I work for the company, when I'm doing my fiduciary job, my fiduciary hat is on and I am at all times working on behalf of the plan participants.

So I'm paying critical attention to what my consultants and my plan professionals are telling me. After all, I'm either a CFO, I'm an HR professional, I might be a lawyer working for the company. I don't know everything about benchmarking expenses, benchmarking the performance of the funds that are in our plan portfolio. I, as a fiduciary, have to depend on others. So what do you tell these fiduciaries, our every day executives who man these positions and fill these positions, Stacey?

Stacey (08:31):

Well, I think it's very important that to stay up to date on the trends in the industry and the law, where these cases are, how they're being developed in terms of how it might affect your particular plan. I think that it's really important, when you're looking at the benchmarks, to make sure that they are the appropriate benchmarks and to have frequent discussions with your service providers about those benchmarks and to understand what a benchmark is and what it means with respect to your investments and your record keeping fees.

And I also think that it's really important to periodically do requests for information and requests for production so that you can continue to make sure that you are falling in a prudent level with respect to your investments and your fees.

Howard (09:31):

How about fiduciary training, Stacey? What do you encourage our clients to do by way of fiduciary training?

Stacey (09:41):

So every fiduciary that comes in needs to be trained as to what the requirements of being the fiduciary are. That is critically important. Because otherwise, they don't know what they're supposed to be doing. And so we recommend that there is consistent fiduciary training frequently on all aspects of what it means to be a fiduciary and how fiduciary should be performing their jobs. Howard, I think one of the other issues that clients would probably like to know is, how are plaintiff's counsel finding their plans? What is attracting plaintiff's counsel to these particular plans?

Howard (10:30):

Well, a lot of the information, Stacey, almost all of the information about plans, this information is publicly available. Let's take, for instance, the major plan information. It is the tax return, the IRS Form 5500, that is the major tax reporting piece of information. It goes to the Internal Revenue Service. It goes to the Department of Labor. And every one of these plaintiff's attorneys, they're paralegals can find these tax forms. These tax forms list assets under management, they list the totality of the plan assets. That's a big trigger. It's not a shock to anybody that the more assets under management in the plan, the more attractive that plan is as a target to plaintiff's counsel. This analysis is not whether the plan is done right or wrong, that's not what the plaintiff's lawyer is thinking about. The plaintiff's lawyer is thinking about, what's my avenue for damages? If there's $2 billion or $1 billion of assets under management, there is a bigger damage target than if there's only $500 million of assets under management. So assets under management, that's a big target.

Stacey (12:15):

I think one of the other big targets, and this is something that plaintiffs think they can glean from the 55 hundreds are the fees that are paid to the service providers. And typically, what we're seeing in these cases are pulled directly from the 5500s of what the plaintiffs think are the fees that are being paid to the record keeper. And because of the various ways that these fees are reported on the 5500s, they're almost exclusively inflated in the complaints. So that's another issue that we're seeing based on the 5500s.

Howard (13:00):

Right, because the 5500s do not exactly portray what plans spend on record keeping fees. Instead the way the 5500s report expense, it reports global expense rather than specific expense. And unfortunately, the courts, some courts, not all courts, but some courts, permit the plaintiffs to get away with using these global expense figures instead of holding plaintiffs to making their case based on specific expense issues. I think the other thing that you see, Stacey, is there are certain types of funds that get people's attention. I know, Stacey, you've done a lot of work with target-date funds. What's attractive about target-date funds and to plaintiff's? Channel you're in a plaintiff for a minute there.

Stacey (14:09):

Right. Particularly, target-date funds that are actively managed versus passively managed. Particularly, if you don't have target-date funds that are maybe collective trust.

Howard (14:23):

And why don't you just explain for people who are not quite as into this area, what's a target-date fund?

Stacey (14:32):

A target-date fund is a fund that has a series of funds underlying it. And it goes through the portion of your life. So if you're 50-

Howard (14:46):

Say you're 30 years old.

Stacey (14:47):

Right. So you would be in a target-date fund-

Howard (14:50):

Your target-date is...

Stacey (14:52):

I don't have any idea what my target would be if [crosstalk 00:14:54] 30.

Howard (14:53):

No, not yours personally. But say your target-date is, you want to have a target-date of age 65 to retire. And then what the fund does is it sets investment goals and it makes your investments more aggressive from age 30 to 55, and then more conservative from age 55 to 65.

Stacey (15:22):

Right. There's a specific glide path for people who, depending on what age they're looking to retire. And that is the specific target-date fund that participants then get into. And in many defined contribution plans, the target-date funds are your QDIAs, which means that those are the funds that, if you don't select, if a participant does not affirmatively select options, they just go into the target-date funds. So typically, the target-date funds have more assets under management than other funds in the plan, which is why they are so attractive to be targeted by plaintiffs.

Howard (16:08):

So that's something that plaintiffs look for. The other thing that is always fascinating to our clients, Stacey, because our clients always feel so singled out. We don't think we did anything wrong, we don't have our participants complaining to us, and yet we have this huge class action lawsuit that's going to be very costly to defend and is going to involve every participant in the plan. So we're frequently asked how it is that the plaintiff's find, the plaintiff lawyers find plaintiffs. Stacey, what's your experience in that?

Stacey (16:53):

So my experience has been for at least the past five to seven years that plaintiff's counsel find plaintiffs via social media. Whether it's LinkedIn, whether it's Facebook, whether it's Snapchat, plaintiff's counsel are finding plaintiffs via social media. It's a really incredibly new phenomenon, and it can be very, very frustrating for companies, but that is how they are finding plaintiffs.

Howard (17:25):

And it's always a very difficult message, Stacey, when you have to explain to your client that we don't think you did anything wrong, we do think that you were targeted, and yes, the way the existing rules are, there's nothing we can do about the fact that plaintiff's counsel have targeted your company.

Stacey (17:53):

So companies and fiduciaries have really good defenses. But unfortunately, most of those defenses, as Howard discussed in the beginning, are during your committee meetings, you take minutes. And so your minutes have very good procedural prudence, and that's a defense. And there are a whole host of documentation that plans have that provide a good defense. Unfortunately, at the beginning of a case, at the pleading stage when defendants file a motion to dismiss, most of that information cannot be included in the motion to dismiss. So what happens then, Howard?

Howard (18:43):

Well, a lot of times we try and put in as much as we can. But sometimes, a lot of times, these cases start off with what we describe as reporting and disclosure requests. Under ERISA, and ERISA does emphasize a, it's a complicated statute. And so it's a statutory regime that focuses on and encourages disclosure to the plan participants. So the plaintiff's lawyers frequently start these cases, Stacey, by sending a letter seeking a lot of information from the plan administrator. The plan administrator is a defined entity, a person or entity who is a fiduciary, and you have a specific amount of time to respond to that letter. Go ahead.

Stacey (19:58):

And please, please, please, if you get a letter like that, do not ignore it because there are specific statutory penalties under ERISA for not responding. So not only are you getting this letter that's giving you a heads up that there is a plaintiff's counsel that is looking at your plan. If you don't respond, you could be subject to some very substantial penalties.

Howard (20:28):

Why don't we do this, Stacey. In our time remaining, let's talk about another hot button issue. And I know that you have litigated this issue frequently in the last four, five years, and that is COBRA litigation.

Stacey (20:45):

Sure. So there was an explosion of COBRA notice litigation. And of course, this is for health plans. But over the-

Howard (20:56):

What does COBRA do Stacey? What do you have to do for COBRA?

Stacey (21:01):

Well, there are a variety of things you have to do for COBRA, but what these litigations involved are the notice requirements for COBRA. So under COBRA, when somebody terminates, regardless of how they terminate from employment, there are a variety of notice requirements that the statute mandates the plan administrator do. And so the litigation itself is about whether the plan administrator actually complied with those notice requirements. Very helpfully, the DOL has put out on its website a model notice. But the DOL does not require that plan administrators follow the notice exactly, as long as it contains the information that the regulations require. And this is where the litigation comes in. Typically, what these claims allege is that there are certain very tiny technical violations of the regulations because the employer did not specifically follow the DOL model notice.

Howard (22:23):

And of course, the law does not require you to follow the DOL model notice. There have easily been at least 35 of these cases filed in the last two years. They are, again, giant class actions. Think, especially during times of COVID, when there have been huge dislocations to work forces and our clients have had to send COBRA notices as people have had qualifying events and have left the workforce.

Stacey (23:04):

And let's talk about, a little bit, why this litigation itself is so problematic and, frankly so-

Howard (23:13):

Pernicious

Stacey (23:13):

... big. Right.

Howard (23:13):

Pernicious.

Stacey (23:15):

And that's because of the penalties. If there is a deficient COBRA notice under ERISA, one participant can get up to $110 per participant per day for the violation. So imagine if you are a health plan that, over the statute of limitations period, let's say it's four years, had 60,000 people weave your employment. And those people all got the same notice that now the plaintiff's counsel have said is deficient. So multiply all of that by $110 per day per participant. And you can see why plaintiff's counsel persist in bringing these claims and why it is important for plan administrators and plan sponsors to be aware of what their notice says.

Howard (24:13):

It's a burgeoning area and [inaudible 00:24:18] with peril. We, unfortunately, are running low on time. We do want to highlight two other areas that we want to flag for upcoming podcasts. The first area I would describe, loosely, as healthcare claims. There is a specific subset within healthcare, again, covered by ERISA as well, known as the Mental Health Parity Act. That act basically forces plans to allocate equal amounts of dollars to mental health claims such as autism, other types of mental health issues, as plans would allocate to other types of more traditional healthcare claims. That's a future topic that we're going to go into. COVID-19, there are going to be lots of ERISA related COVID-19 topics that we are going to be talking about in the future. So great as always to talk with you about these topics. We could go on and on, but I'm not sure the audience could.

Stacey (25:46):

No, I don't think so, but thank you.

Howard (25:48):

Thank you all very much.

Speaker 1 (25:53):

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