

Prime Healthcare Lacked Oversight Of 401(k) Plan, Judge Told

By Craig Clough

Law360 (April 9, 2024, 10:42 PM EDT) -- An attorney who specializes in Employee Retirement Income Security Act litigation testified on Tuesday as the first witness in a California bench trial for two certified classes claiming Prime Healthcare Services Inc. poorly managed their 401(k) plans, and said the company's oversight of its investment committee was "almost a dereliction of duty."

Marcia S. Wagner of The Wagner Law Group testified as an expert for the plaintiffs on the first day of the trial. He said the board of Prime Healthcare Services, Inc. exerted little to no control over the co-defendant, the company's 401(k) plan committee, which managed the retirement funds at issue in the case.

"It's well established in the ERISA community and the benefits community that if you are a delegating fiduciary, you still have residual fiduciary responsibility, you have an oversight responsibility to make sure the people that you've appointed are fulfilling their jobs in a reasonable and a prudent and an adequate way," Wagner said.

"And especially when it comes to investment management, I see boards where delegating fiduciaries are trying to get information and reports back. Here, I saw none of that until 2019 when there was one written report ... to the board, and there was nothing thereafter," Wagner continued. "I saw no interaction whatsoever. To me, it just looked like almost a dereliction of duty. There was no oversight, there was no meaningful oversight."

U.S. District Judge Josephine L. Staton, who is overseeing the bench trial, approved **two certified classes** in the case in January, totaling 11,000 plan participants, in the ERISA suit. Prime Healthcare is a health system based in Ontario, California, that includes 44 hospitals and 300 outpatient clinics across the country, according to the company website.

Plaintiff Maria Ornelas filed suit against Prime Healthcare in August 2020, alleging the company violated its fiduciary duties under ERISA by allowing its retirement plan to pay excessive recordkeeping fees and retain expensive and risky funds. In December 2020, Ornelas' suit was consolidated with a nearly identical case led by Brian Horton and Paulina Cervantes.

In **July 2021**, Judge Staton largely rejected Prime Healthcare's bid to dismiss the suit, agreeing only to toss a claim that the company, its retirement committees and its CEO should be held accountable for "a knowing breach of trust."

One certified "Challenged-Funds and Expense-Monitoring Class" covers all plan participants and beneficiaries who was a participant from Aug. 18, 2014 to the present, and a second "Recordkeeping-Fees Class" covers all participants and beneficiaries of the plan from Aug. 18, 2014 to July 31, 2019.

Aside from inflated recordkeeping fees, the plaintiffs also allege that Prime Healthcare wrongly offered the Fidelity Freedom fund target-date suite, or active suite, instead of its "cousin" — the "substantially less costly and less risky Freedom Index funds," or index suite.

The active suite was too risky to be suitable for plan participants as well as being "dramatically more expensive" than the index suite, according to the plaintiffs, who allege the plan could have saved \$2.3 million in costs in 2018 alone had it not gone with the active suite. The retirement plan was also weighed down by other bad investment options besides the active suite, according to the plaintiffs.br />

Among the problems, Wagner said she found with the management of the 401(k) plan was allowing the plan's record keeper, Transamerica Retirement Solutions LLC, to keep charging the same percentage for recordkeeping when it could have likely saved money by issuing a request for proposals.

Between 2015 and 2019 the plan's assets ballooned by around 400%, Wagner said, mirroring allegations in the complaint that Transamerica received more compensation over time even though its workload and level of service did not increase.

"You've got to monitor it specifically, because when assets increase significantly, as they did here, they increased four times, 400 percent, in a very short period of time, you have to monitor what are the actual dollars that we're paying for record keeping, and is that appropriate?" Wagner said.

According to the plaintiffs, Prime Healthcare eventually capped the annual fees to Transamerica in the amount of \$50 per participant on Aug. 1, 2019, which is the day the class period ends for the record keeping class. But Wagner said when Prime Healthcare finally issued an RFP in 2020, they were able to get a fee for \$34 per participant.

With an RFP "you get actual dollar amounts and you have actual ... bidding, and so what you have, is you have the potentiality of discussions and negotiations to hopefully lower the fees," Wagner said.

Under cross-examination by Darren E. Nadel of Littler Mendelson PC, Wagner agreed that she testified in a previous case that "the concept of an RFP is not limited with respect to time."

"And do you agree that there's no standard mandated under ERISA for this?" Wagner asked.

"As I think I've said now three times, ERISA doesn't require, it's not a rules-based

statute, it's a process-based statute," Wagner answered. "So it's not going to say, 'You shall do something on day 181.' That isn't how ERISA operates."

Wanger also agreed that she testified in a previous case that RFP are "almost becoming antiquated" because vendors are voluntarily reducing their fees.

"That's true, apparently with the exception of Transamerica, which wasn't doing that," Wagner answered.

Brian Brady, the former director of investment for Prime Healthcare, appeared as the second witness in the case on Tuesday, saying he worked at the company from 2016 to 2022 and also served on the 401(k) plan committee. He pushed back on questions suggesting there was lax oversight by the committee of its investment advisor, Captrust.

Brady insisted he worked to verify the information that Captrust provided, including by looking up the funds himself, which he was knowledgeable about as a former investment advisor. He agreed that he testified at his deposition that he could not recall any committee member expressing concern about Captrust's performance.

He also said an RFP for record keeping fees could be cumbersome compared to benchmarking, as they "relatively reflected the same information, and sometimes if needed, we could go beyond benchmarking to an RFP."

But Brady also said an RFP is "not necessarily more complete, because with benchmarking you're capturing more data from more providers, whereas with an RFP you're usually capturing just a few, or a handful of providers."

Brady was still on the stand fielding questions from an attorney for the defendants when the proceedings ended for the day. His testimony is expected to resume on Wednesday.

The plan participants are represented by James C. Shah, James E. Miller, Laurie Rubinow and Alec J. Berin of Miller Shah LLP and by Mark K. Gyandoh and Donald R. Reavey of Capozzi Adler PC.

Prime Healthcare is represented by Darren E. Nadel, Bradley J. Crowell, Wesley E. Stockard, Rachel P. Kaercher, Pamela S.C. Reynolds and Sara Zimmerman of Littler Mendelson PC.

The case is In re: Prime Healthcare ERISA Litigation, case number 8:20-cv-01529, in the U.S. District Court for the Central District of California.

--Editing by Vaqas Asghar.

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