LEGAL UPDATE

2017 Plan Litigation

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We can expect to see more litigation with respect to Code Section 403(b) plans alleging various breaches of fiduciary duty. This is a clear example of low-hanging fruit that is ripe for copycat litigation. It is actually somewhat surprising that it took as long as it did for these suits to be brought. While 403(b) plans have become closer to 401(k) platforms since the Pension Protection Act of 2006, there were significant differences prior to that date, so it remains to be seen whether those fiduciary breach claims will stand up. Clearly, some of the large universities involved in these civil actions will contest the cases vigorously, but they may settle even if they have strong cases because the low percentage, but high potential, cost of an adverse decision makes settlement a cost-effective option.

The lawsuits against the administrators of 401(k) plans for various breaches of fiduciary duty will likely continue, although decisions such as the recent District Court decision in *White v. Chevron* may give potential plaintiffs pause. Litigation can also be expected to flesh out the duty to monitor addressed in broad terms by the Supreme Court in *Tibble*. Two issues need to be addressed: (1) the frequency of the monitoring activities, and (2) the depth of the duty. A duty to monitor cannot be intended to duplicate the activities of the service provider performing the function.

The Supreme Court's decision to grant certiorari with respect to the definition of church plan under ERISA and the Code could also produce a significant increase in litigation against these church-affiliated organizations if the Supreme Court agrees with the three Circuit Courts of Appeal that have addressed this issue and concludes that the long-standing view of the Internal Revenue Service was incorrect and defined benefit plans of these church-affiliated organizations are not church plans.

The various defined benefit plans that engaged in derisking activities such as temporary lump-sum windows are also a potential target of litigation, although these may be difficult cases for plaintiffs to prevail. The allegation will be that there was a breach of fiduciary duty in disclosing to plan participants the advantages and disadvantages of selecting a lump sum. While in all cases some disclosure would have been made, the allegations will be that because the plan sponsor had the objective of maximizing the number of participants who would elect lump-sum distributions, the disclosure to plan participants was one-sided to some degree.

There will also be more cases exploring the contours of Article III standing, addressed earlier this year by the Supreme Court in *Spokeo v. Robins*,136 S. Ct. 1540 (2016), in which it held that Article III standing requires a concrete violation even in the context of a statutory violation. Two Court of Appeal decisions have already addressed the application of *Spokeo*: the Eighth Circuit in *Braitberg v. Charter Communications, Inc.*, 2016 WL 4698283 (8th Cir. September 8, 2016) and the Fifth Circuit in *Lee v. Verizon*, 837 F. 3d 523 (5th Cir. 2016). Since plaintiffs will no longer be able to allege that a violation of ERISA automatically constitutes an injury in fact for purposes of Article III standing, there will likely be more motions to dismiss because of lack of Article III standing.

The DOL fiduciary rule is a bit of a wild card because there is no assurance that it will continue, or at least continue in exactly the same form, under the Trump Administration as is scheduled to take place on April 10, 2017. It was intended to allow IRAs and non-ERISA plans to maintain civil actions; those actions will be forthcoming. Additionally, by increasing the number of entities that will be treated as fiduciaries, the likelihood is that there will also be an increased number of lawsuits in which a party is joined by a defendant alleging cofiduciary liability.

Also, it is probably only a matter of time before a data security breach in a pension plan results in a claim for breach of fiduciary duty. Sponsors of welfare plans are generally familiar with these issues because of HIPAA and the recent step up in audit activity by Health and Human Services, but HIPAA is limited to group health plans and the DOL has, to date, not taken a position with respect to possible fiduciary duties with respect to the safeguarding of participant data. However, in November, the ERISA Advisory Council, while not opining on the fiduciary issue, hoped that the DOL would publicize the Council's findings and "provide information to the employee benefit community to educate them on cybersecurity risks and potential approaches for managing these risks." If plan sponsors do not at least pay some attention to the ways in which cybersecurity risks might be handled, and there is a data breach, some plaintiff may take the lead from the DOL and assert a fiduciary breach.

With the DOL paying more attention to compliance issues under the Mental Health Parity and Equity Addiction Act, publicity of noncompliant activities under that Act is another possible source of litigation. If the DOL were to follow through on its project of expanding greatly welfare plan disclosure on Form 5500, actions by the DOL with respect to enforcement would increase, although it is unclear whether this initiative will be continued by the Trump Administration. Similarly, there is a question of whether the DOL would continue its efforts to create a circuit split on the enforceability of forum selection clauses under ERISA and its narrow definition of "top-hat" plan.

Even if the Affordable Care Act (ACA) is repealed and replaced in some fashion, with the elimination of the employer and individual mandates, there are likely to be more claims made by affected employees that actions which limit the hours of service so that they would not be treated as full-time employees under ACA violate the anti-retaliation provisions of Section 510 of ERISA. More generally, the ACA has placed an increased emphasis on welfare plans, which may in part account for the uptick in recent years of actions by out of network providers and efforts by plans to cut-off those actions by explicit anti-assignment clauses prohibiting participants from assigning claims to health care providers.

Finally, there will be additional stock drop cases filed as plaintiffs attempt to satisfy the pleading standards established by the Supreme Court in *Fifth Third Bancorp v. Dudenhoefer and Amgen, Inc. v. Harris.*

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