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Major 401(k) Litigators Are 'Back in Action,' With More Entering the Fray

After a lull in filings last year, 2024 is seeing an uptick, including from law firms not previously active in 401(k) litigation.

Reported by MALLIKA MITRA

Just more than halfway through 2024, 401(k) plan lawsuits based on the Employee Retirement Income Security Act show no sign of slowing down.

After a dip in the number of lawsuits in 2023, they have picked up pace in 2024, with complaints ranging from excessive fees for recordkeeper services to use of managed accounts in plans. The most prolific law firms like Walcheske & Luzi and Capozzi Adler are filing a consistent number of cases.

"Those law firms were digesting their significant case portfolio in 2023 because they filed many cases in 2022, and we feel they were just managing their portfolio," says Daniel Aronowitz, president of Encore Fiduciary. "But they're back in action, with each of the law firms essentially filing one or two cases per month."

New Types of Cases

From 2021 and 2023, there were approximately 200 401(k) plan lawsuits filed, according to Aronowitz: 60 in 2021, 88 in 2022 and 48 in 2023. While 2024 is so far on a similar pace as last year for excess-fee cases—23 in the first half of the year—there have been 43 overall class actions filed involving retirement plans, higher than last year.

The additional cases reflect a trend toward more class action fiduciary breach lawsuits involving defined benefit retirement and health plans, Aronowitz says. Five cases were filed challenging pension risk transfers to annuity and retirement services provider Athene, and at least five cases were filed involving challenges to health plan fees, including four filed by plan sponsors against third-party administrators. A trend of actuarial equivalence cases is continuing as well, he adds.

For excessive fee cases, most cases are surviving an early motion to dismiss, which is often the case, as usually 70% to 80% survive, Aronowitz says. However, there have been several cases dismissed on summary judgment this year—including those against Humana Inc., Evonik Corp. and PNC Financial—which "is rare, as the conventional wisdom is that it is difficult to win summary judgment on fiduciary process grounds, given the inherent fact issues in proving prudence."

There are also new theories popping up, he notes: "The flavor of the month is plan forfeitures," which started with a new firm filing complaints at the end of last year and has continued this year, mostly in California.

Challenging a plan fiduciary's application of forfeitures is a bit of a "wild card," says Marcia S. Wagner, founder of and managing partner in the Wagner Law Group. The two decisions to date reached opposite conclusions, but if additional district court decisions support plaintiffs' positions in these cases, there will likely be an increased number of these types of cases brought, since the practice of applying forfeitures to reduce employer contributions is commonplace, she told PLANADVISER via email.

Cases From Wider Range of Firms

New law firms have jumped into the fray in recent years, following patterns and issues that have proven successful.
“You used to recognize the names of all the firms that brought these cases,” saysJoshua Lichtenstein, an ERISA and benefits partner in Ropes & Gray. “It used to be when you looked up the filing, you had a feeling of who the firm was.”

That has not been the case for about the last two years. Nowadays, there are a lot of smaller firms bringing “copycat cases,” he says. Those can include the types of cases that are “always percolating”—such as those alleging recordkeepers are too expensive—but there were also a significant number of cases involving target-date funds included in plans in a short period of time. Lichtenstein says the case he is most “concerned” about is one against American Airlines for allegedly breaching its fiduciary duty by offering funds focused on investments based on environmental, social and governance principles.

“If that case succeeds, I don’t see why that same theory wouldn’t work to sue virtually any plan sponsor,” says Lichtenstein. He believes the American Airlines case has no merit.

This environment makes it difficult for a plan sponsor to understand the types of claims that could be on the horizon and address those claims preventatively, Lichtenstein adds. He does not see how this influx of copycat cases could end without legislation changing pleading standards and making it more difficult to bring these cases.

Major firms, meanwhile, appear to be narrowing their scope based on their understanding of what courts will allow, according to Wagner.

“The results in a particular circuit may affect the number of lawsuits,” says Wagner. If courts in a circuit are generally dismissing excessive fee claims because a plaintiff failed to establish meaningful comparators, plaintiffs must either stop filing that type of lawsuit or spend more time finding information that will enable them to address the court’s concerns, she adds.

What’s to Come

Wagner says one area in which she has not seen cases but had expected to is cybersecurity breaches.

“By their nature, there is a limited number of such lawsuits that could be filed in any plan year, but I had anticipated seeing some filings,” says Wagner.

She also says there may be more lawsuits brought against nonfiduciaries. While the rules with respect to nonfiduciary liability are more difficult for a plaintiff to satisfy, this approach would allow different parties to be treated as defendants.

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