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FocusOn Call
BENEFITS LITIGATION UPDATE

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The ACA Mandate

Presented by:

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The ACA Mandate

- A “Large Employer” is defined as an employer of at least 50 full time or FTE employees the prior year
- A “full time” employee works at least an average of 30 hours per week
- FTE = total non – FT hours per month ÷ 120
- “Large Employers” must pay a $2,000 per employee “tax” if it does not offer the opportunity to enroll self and dependents in a minimum coverage health insurance plan

Strategies to Avoid the Tax

- Stay below 50 FT and FTE employees by:
  - Stop hiring at 49 FT and FTE employees
  - Going forward, hire only less than full-time employees (watching the FTE formula)
  - Reduce the number of hours to below 30 per week to reduce number of FT and FTE employees to below 50, but incentivize productivity
  - Reduce the number of employees to below 50 by layoffs
  - Have a two-tiered FT/PT workforce, but assign overtime only to FT employees
- Amend plans to limit "participants" to FT employees (minimum 30 hours/week)

ERISA Section 510

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitle under the plan. . . .

29 U.S.C.§ 1140

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Section 510 Risks – Managing the Workforce for Tax Purposes is Legitimate

- Newly hired “part-time” employees
- Restrict overtime to FT employees
- Demote/lay-off FT employees to get below 50
- Demote some FTs to PT and shift overtime to remaining FTs
- Subcontractors/consultants issues

Equitable Remedies After Amara

Presented by:

Scott Macey

Background

- One of the more confusing aspects of ERISA
- Based on ERISA Section 502(a)(3)
  - "Appropriate equitable relief"
- Mertens v. Hewitt (Sup. Ct.)
  - No monetary relief in claim against non-fiduciary
- Varity v. Howe (Sup. Ct.)
  - Can't lie to participants – reinstatement to prior plan
- Sponsor subrogation cases

Types of ERISA Relief

- Individual claims for benefits
- Recoveries for plan based on fiduciary breach
- Various types of individual equitable relief:
  - Plan reformation
    - Fraud or mutual mistake in plan document
  - Unjust enrichment
    - Disgorge ill-gotten gains to plan
  - Detrimental reliance
    - Relief based on wrongful act, reliance, harm
  - Surcharge = money damage
    - Standards still evolving

Types of ERISA Relief Cont.

- Detrimental Reliance
  - Relief based on wrongful act, reliance, harm
- Surcharge = money damage
  - Standards still evolving

Types of Cases

- Plan terms/communications differ
- Plan amendment communications
- Incorrect coverage communications
- Plan administrative errors
  - e.g. incorrect pre-cert. approval
- Individual vs. class action claims

Cigna v. Amara

- Supreme Court (2011)
- SPD's are not plan documents
  - But intentional or negligent communications can lead to equitable remedies
  - Includes Monetary Relief
- DOL position
  - Mere mistaken SPD sufficient even if no reliance or clear harm

Current Issues

- Do mere mistakes or ambiguities without more cause liability
- When should class actions be allowed
- What should participants have to allege/show
  - Fraud claims
  - Mistake claims
- Current status of administrative deference

Recent Cases

- Skinner v. Northrup Grumann (9th Cir.)
  - No reformation or surcharge without reliance and proof of harm
- McCravy v. MetLife (4th Cir.) and Moon v. BWX Tech. (4th Cir.)
  - Estoppel and surcharge appropriate for mistaken coverage statements
    - e.g. covered by life insurance but not
    - Similar decisions in other courts

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Recent Cases Cont.

- Kenseth v. Dean Health Plan (7th Cir.)
  - Court held money type damages available for administrative communication mistake re. retiree health coverage
- Key Second Circuit Cases
  - Amara – district court ruling in favor of plaintiffs
  - Osberg v. Foot Locker – district court ruled in favor of sponsor on alleged mistaken/ambiguous amendment communications
  - Frommert v. Conkright – even with deference to administrator, court held its decision unreasonable

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Key Take Aways

- Court interpretations evolving
- Liberal interpretations could be very costly and damaging
  - If properly decided, should be limited to class fraud or individual mistake claims
- Courts need to recognize Justice Roberts recognition that mistakes happen
- Be careful with communications and administration
- Keep tuned

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First Decision from Supreme Court This Term

Presented by:

John Houston Pope

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First Supreme Court Opinion of the Term

Heimeshoff v. Hartford Life

- Plan-imposed deadline to bring suit
- Measured from "proof of loss"
- 3 years from "proof of loss"
- Shorter than most state statutes of limitations for contractually based claims

Heimeshoff

Plan may start its contractually based limitations period from any date provided:

(1) Claimant has reasonable amount of time to pursue judicial review

(2) Plan term does not conflict with controlling statutory provision

Heimeshoff – Takeaways

- Add contractual period of limitation from benefit claims (if you don't have one)
  - One year or more after administrative appeals finish
  - Courts may apply equitable principles if period too short
- Not likely to help with breach of fiduciary duty claims
- Will contractual venue provisions get a boost?

Fee Litigation

Presented by:

Debra A. Davis

ERISA requires fiduciaries to only pay reasonable fees from plan assets

- Plan fiduciaries must act in the best interests of plan participants
- Fiduciaries are held to the standard of a prudent person
- They must ensure that plans only pay reasonable fees for appropriate services

Some courts have found fiduciaries liable for "excessive fees" paid by the plan

- In *Tibble v. Edison Int'l*, participants were awarded damages of $370,000 where the plan included retail-class shares of mutual funds
- In *Tussey v. ABB*, the court held that the fiduciaries failed to timely evaluate the reasonableness of the fees and awarded participants $39.6 million

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A number of cases have settled for millions of dollars

- In *Nolte v. CIGNA Corp.*, participants alleged that the fiduciaries allowed the plan to pay excessive investment management and other fees
  - The case settled for $35 million in October 2013
- In *Beesley v. International Paper*, participants claimed the plan paid $58 million in unreasonable fees
  - The case settled for $30 million in October 2013

However, fiduciaries have not been held liable in some cases

- In *Hecker v. Deere*, the court held that the inclusion of allegedly expensive funds was not a breach of fiduciary duty
- In *Taylor v. United Technologies*, the court held that the participants failed to challenge the fees of any particular mutual fund and that the fees paid to the record keeper were not unreasonable

Other "excessive fee" cases still have not been resolved

- In *Spano v. Boeing*, participants alleged that excessive fees were imposed through hard dollar costs and revenue sharing
  - The Seventh Circuit allowed the case to proceed
- In *Abbott v. Lockheed Martin Corp.*, participants alleged that the fiduciaries should have selected institutional shares instead of retail shares
  - ERIC filed an amicus brief with the Seventh Circuit Court of Appeals on behalf of Lockheed Martin
  - The case is proceeding at the District Court level

New "excessive fee" cases continue to be filed

- In *Gordan v. Massachusetts Mutual Life Insurance*, participants alleged that fiduciaries selected and retained unreasonable expensive investments
  - The case was filed on November 5, 2013

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Plan fiduciaries should ensure that they continue to evaluate their plans' fees

- Participants now receive additional information about their plans' fees, which may result in higher levels of scrutiny
- Settlements and judgments in favor of participants may also cause participants to consider filing suits

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Guidance on the Moensch Presumption

Presented by:

Paul A. Friedman
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Fifth Third Bankcorp et al. v. Dudenhoeffer et al. (Supreme Court 2014)

- The Supreme Court has the opportunity to resolve the conflict between various courts of appeals regarding the ***Moensch*** presumption
- The majority of the circuit courts of appeal (Second, Third, Fifth, Seventh and Eleventh) have ruled that the allegations contained in a complaint must rebut the presumption
- The Sixth Circuit has taken a minority view stating that the allegations in a complaint need not rebut the presumption

Fifth Third Bankcorp et al. v. Dudenhoeffer et al. (Supreme Court 2014)

- The Department of Labor through an amicus brief filed by the Solicitor General has asserted that a court should never apply a presumption that an ESOP fiduciary acted prudently at any stage of the proceedings

- Rather, the issue before the Court should be reformulated to first consider if an ESOP fiduciary should ever be afforded a presumption of prudency. Secondly if an ESOP fiduciary were to be afforded such a presumption, at what stage of the case should the presumption apply. Finally the Court should state what is required to rebut the presumption

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