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FocusOn Call
BENEFITS LITIGATION UPDATE

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Agenda

1. Texas Medical Board Takes Hardline Telehealth Stance
2. King v. Burwell
3. Tibble v. Edison
4. Harris v. Amgen, Inc.
5. National Elevator Industry Health Benefit Plan v. Montanile
6. Gobeille v. Liberty Mutual Insurance Company
7. Rojas v. CIGNA
8. Obergefell v. Hodges
9. Marin v. Dave & Buster's Inc.

Texas Medical Board Takes Hardline Telehealth Stance

PRESENTED BY: GRETCHEN K. YOUNG

Texas Medical Board Takes Hardline Telehealth Stance

- Board takes position requiring face-to-face visit or in-person evaluation before certain prescriptions may be issued
- Teladoc sues Board on antitrust grounds
- District Court prevents Board's new rule from taking effect
- More motions and counter-motions follow
- Trial set for February, 2017

King v. Burwell

Business as Usual for Employer Plan Compliance under the ACA

Presented by: John Houston Pope

King v. Burwell

- Use of subsidies in states that do not establish exchanges
- DC Cir. & 4th Cir. issue conflicting opinions on the same day; then D.C. Cir. withdraws for en banc hearing
- Supreme Court reached for this one

King v. Burwell

- Supreme Court upholds government, 6-3
- Structure of ACA itself requires subsidies to be offered in all states
- Better than lower court ruling, which merely deferred to IRS

King v. Burwell

Take Aways

- Business as usual
- Statute's meaning more secure
- Third-wave challenges?
  - Sissel
  - Boehner

Tibble v. Edison

Continuing Duty to Monitor Section 401(k) Investments

Presented by: Kenneth J. Kelly

Tibble v. Edison International

Ninth Circuit Decision

March 2013 Ninth Circuit decision was a major victory for fiduciaries:

- Six year period for asserting imprudence in plan design.
- *Firestone* discretion goes beyond benefits denials.
- Totality of circumstances and "process" for evaluating investment options selected.
- Documenting decision-making process will often be decisive.

Tibble v. Edison International

Ninth Circuit

"Mere continued offering of a plan option, without more" did not constitute a "subsequent breach" of duty triggering the statue. Plaintiff's had not submitted evidence of such a "significant change" during the six year SOL period to prompt a due diligence review equivalent to adding new investment options.

Tibble v. Edison International

SCOTUS

Only Challenge Accepted by SCOTUS

"Notwithstanding the ongoing nature of ERISA's fiduciary duties, does the statute of limitations under 29 U.S.C. § 1113(1) immunize 401(k) plan fiduciaries for retaining imprudent investments that continue to cause the plan losses if the funds were first included in the plan more than six years ago?"

– Plaintiff's Petition for Certiorari

Tibble v. Edison International

Take Aways

- Six-year limitations period is side-stepped until lower courts define what is the “trigger”.
- When does a prudent decision go from simply less desirable to imprudent?
- Plan fiduciaries have more work in monitoring ongoing investments in documenting decisions to review as well as reviews themselves.
- Professional consultants continue to be advisable in monitoring as in the initial selection process.
- How will Ninth Circuit handle this – any clarification?

Tibble v. Edison International

SCOTUS

Plan fiduciaries have a continuing duty to monitor investment plan options an change investments when necessary and required by something less than a "significant change" in circumstances. Open items:

- What is the threshold "less than a significant change"?
- What is the scope of the review?
- How to measure prudent action?

Harris v. Amgen, Inc.

"Stock Drop" Case

Presented by: Kenneth J. Kelly

Harris v. Amgen, Inc.

- The Ninth Circuit held on 10/30/14 that plaintiffs sufficiently pleaded a breach of duty by the plan fiduciaries (a) continuing to allow participants to invest in Amgen stock when they knew or should have known the stock was artificially inflated, and (b) failing to provide material information to plan participants.
- Are ESOP/EIAP fiduciaries held to same duty of prudence as other fiduciaries after *Dudenhoffer*?

Harris v. Amgen, Inc.

Unusual Fact Pattern

- Plan fiduciaries and individual defendants included executives who were allegedly aware of highly negative inside information regarding major Amgen pharma products.
- Defendants were being sued in a separate action for section 10(b) securities laws violations, where motion to dismiss the complaint had been denied.
- Motion to dismiss accepts detailed “plausible” allegations of illegal scheme to maintain artificially-inflated price.

Harris v. Amgen, Inc.

Fiduciaries Arguments Rejected

- Amgen stock was a reasonable investment since it was a strong, successful firm.
- Drop in stock alone does not establish imprudent investment
- Had the fiduciaries barred new investments, the price would have dropped, and the result might have been worse for the investors, or have simply eliminated the artificial inflation.
- Removal of the stock's availability would violate insider trading laws.

Harris v. Amgen, Inc.

Why the Consternation?

- *Dudenhoffer* emphasized (9-0) that despite the elimination of the "presumption of prudence," courts were instructed to analyze complaints under *Twiqbal* and a "careful, context-sensitive scrutiny "in order to discourage "meritless lawsuits."
- SCOTUS said there is no liability if *any* "prudent fiduciary in the defendant's position could [] have concluded that stopping purchases . . . or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund."

Harris v. Amgen, Inc.

- SCOTUS said that lower courts should carefully "consider the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws."
- Vacate and remand was a "message"?
- Ninth Circuit does not change mind.
- En banc is denied, with four dissenters.
- What's next?

Board of Trustees of the National Elevator Industry Health Benefit Plan v. Montanile

Equitable Remedies

Presented by: John Houston Pope

National Elevator Industry Health Benefit Plan v. Montanile

- Case to be argued upcoming Term
- Equitable reimbursement from plan participant – but proceeds have left participant's possession
- Split among the courts of appeals

National Elevator Industry Health Benefit Plan v. Montanile

Potential Impact

- Timing of bringing actions to recover reimbursement
- Possibility that participants can shield funds from recoupment

Gobeille v. Liberty Mutual Insurance Company

ERISA Preemption

Presented by: Kenneth J. Kelly

Gobeille v. Liberty Mutual Insurance Company

Vermont

- Vermont requires health care payors – government agencies, insurers, self-insuring employers (including public entities, TPAs, PBMs, ASOs – to collect and provide to the Vermont government a wide range of data regarding health care recipients, services and providers, as well as to encrypting the data to comply with HIPAA to exclude names, addresses, SSAN, etc., in required formats.
- Second Circuit (2 to 1) held that ERISA preempted the VT statute and regulations as an impermissible burden on ERISA plans reporting requirements.
- SCOTUS grants certiorari.

Gobeille v. Liberty Mutual Insurance Company

Vermont's Position

State Interests

- States have historical power to regulate costs, quality and utilization of health care.
- Costs incurred in provision of health care is state concern.
- Databases allow for "transparency" in the marketplace.
- Databases give insurers, policymakers and researchers tools for innovation and improvement, as well as setting licensing and safety standards.

Gobeille v. Liberty Mutual Insurance Company

Vermont's Position

Precedent

- Preemption jurisprudence has been narrowing preemption for 20 years, and the data collecting required by the APCD law does not create overlapping or contradictory regulation of the structural or "core" functions of ERISA plans, as do coverage mandates, anti-subrogation rules, enforcement mechanisms, benefit calculations, etc.
- The reporting requirement is only a *de minimis* burden, and is not different from the laws or regulations upheld regarding traditional state subjects such as taxing a hospital (*Travellers* and *DeBuono*), or apprenticeship programs' minimum wages (*Dillingham*).

Gobeille v. Liberty Mutual Insurance Company

Liberty Mutual's Position

- The vast reporting requirements of the VT APCD law squarely address a core ERISA-required function – record-keeping and recording.
- Apart from regulating retirement plan fiduciaries' responsibilities, ERISA protects plans of all types from state laws conflicting with federal regulation and imposing multiple burdens on plans, so as to simplify (and thus encourage) plan administration for national or regional plans.
- Preemption requires analysis of the effect of state laws on ERISA plans, even though the state law may have beneficial effects.
- VT allows the data gathered to be widely available as a "resource" for insurers, employers, providers, purchases of healthcare and state agencies, which might conflict with plan documents' confidentiality mandates, effectively impermissibly modifying the plans.

Gobeille v. Liberty Mutual Insurance Company

Take Aways

- Will this be a vehicle for further narrowing of ERISA preemption? The regulation in VT is distinguishable from the tangential impact of taxes and wages.
- Practical impact on permitting states to expand collecting and reporting simply to collect data without any *specific* reason to do so? The complexity of the VT scheme multiplied by dozens of states will invariably increase health care costs in an era when "affordable" costs are a national objective.

Rojas v. CIGNA

Court Limits Ability of Healthcare Providers to Sue ERISA Plans

Presented by: John Houston Pope

Rojas v. CIGNA

- Doctors sued to get placed back into network
- Claimed to "beneficiaries" within meaning of ERISA
- Second Circuit rejected, joining Ninth and Eleventh Circuits

Rojas v. CIGNA

Who is a beneficiary?

"A beneficiary is best understood as an individual who enjoys rights equal to the participant's to receive coverage from the healthcare plan. A participant's spouse or child is the most likely candidate for this term."

"Th[e] right to payment does not a beneficiary make."

Rojas v. CIGNA

Take-Aways

- Healthcare providers cannot sue as “beneficiaries”
- Assignments will be narrowly construed
- Anti-assignment clauses in plans may be important to protect against harassing litigation

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Obergefell v. Hodges

Same-Sex Marriages

Presented by: Frank C. Morris, Jr.

Obergefell v. Hodges

Holding

- On June 26, 2015, the SCOTUS held that the Fourteenth Amendment requires states to:
  1. license a marriage between two people of the same sex; and
  2. recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

Import

- Far reaching implications for employee benefit plans, requiring most plan sponsors and other plan fiduciaries to amend plan documents and change the way in which retirement, health, and welfare benefits are administered.

Obergefell v. Hodges

Background

- In 2013, the SCOTUS in *U.S. v. Windsor* invalidated Section 3 of the Defense of Marriage Act ("DOMA"), which prevented federal recognition of same-sex marriages.
- *Windsor* left intact Section 2 of DOMA, which provides that no state is required to recognize same-sex marriages from other states.

Issues

- Whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex.
- Whether the Fourteenth Amendment requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

Obergefell v. Hodges

Impact on Employer Provided Health & Welfare Benefits

- Private sector self-insured plans retain flexibility to offer same-sex spousal coverage, as ERISA preempts state and local laws regulating insurance.
  - Federal nondiscrimination laws – risk of Title VII sex discrimination claim if an the employer provides benefits to opposite-sex spouses but not same-sex spouses
  - State nondiscrimination laws
  - Contractual provisions
- Cannot purchase fully-insured coverage that excludes same-sex spouses.
- Domestic Partner coverage should be evaluated.
  - State and local laws
  - Employee attraction and retention considerations
  - Discrimination issue if only offered to same-sex domestic partners

Obergefell v. Hodges

Impact on Employer Provided Retirement Benefits

After *Windsor*, same-sex spouses were entitled to the same treatment as opposite-sex spouses for all federal tax law and ERISA purposes, including:

- Required Minimum Distributions – Age 70 ½
- Eligible Rollover Distributions
- Qualified Domestic Relations Orders ("QDROs")
- Beneficiary Designations
- Qualified Joint and Survivor Annuities ("QJSAs")
- Qualified Pre-Retirement Survivor Annuities ("QPSAs")
- Hardship Withdrawals
- Plan Loans

Since most of the spousal provisions under private retirement plans are governed by federal law, the impact of the *Obergefell* decision is largely limited to state tax withholding rate obligations on distributions.

Marin v. Dave & Buster's Inc.

ACA Workforce Management and ERISA Serve Up A Toxic Dish

Presented by: Frank C. Morris, Jr.

Marin v. Dave & Buster's Inc.

Alleged ERISA 510 Violation for ACA Workforce Management

- Filed in the S.D.N.Y. on May 8, 2015 (1:15-cv-03608), this putative class action is the first case accusing an employer of violating ERISA Section 510 by reducing the hours of employees below 30 a week in order to avoid being required to provide health insurance under the ACA.
  - In announcing the "right sizing" workforce changes, the employer was accused of stating that compliance with the ACA would have cost the employer as much as "two million dollars."
  - The Employer also is alleged to have adverted to the "significant negative impact on our business" from the effects of the ACA in SEC filings.

Marin v. Dave & Buster's Inc.

Prevailing Under ERISA 510

- Generally, unless an ERISA plaintiff produces direct evidence that the employer had a specific intent to violate ERISA Section 510, courts will analyze a Section 510 claim using the same *McDonnell Douglas-Burdine* burden-shifting approach followed in employment discrimination cases.

Marin v. Dave & Buster's Inc.

Prevailing under ERISA 510

- A plaintiff lacking direct proof must first establish a prima facie case by showing:
  - engagement in an activity protected by ERISA 510;
  - suffered an adverse employment action; and
  - a causal connection between protected activity and adverse action
- The employer must then produce admissible evidence of a legitimate, nondiscriminatory reason for the action taken.
- If the employer does so, the employee has the ultimate burden of persuasion to establish that the employer was motivated by the specific intent to avoid providing the benefit.

Marin v. Dave & Buster's Inc.

Relief Under Section 502 of ERISA

- Section 502 of ERISA could entitle a participant to payment of the value of the health care benefits the employee would have received as a full-time employee, if plaintiffs prove their hours were reduced in violation of ERISA Section 510.
- This might hit an employer especially hard if the plan was fully-insured and the insurer is unwilling to retroactively re-enroll the affected participants.

Marin v. Dave & Buster's Inc.

Business Decision or Benefits Interference?

- In the context of reducing employees' hours, the decisive issue under ERISA 510 may boil down to whether managing the hours of the workforce constitutes
  - a legitimate entrepreneurial decision involving management of costs or
  - an intentional interference with an employee's benefit rights.
- Employers generally are free under ERISA, for any reason at any time, to adopt, modify, or terminate a welfare benefit plan (*Inter Modal Rail Employees Association v. Atchison, Topeka & Santa Fe Railway*).
- Given that specific intent lies at the heart of ERISA 510 liability, however, employers contemplating any such actions should carefully consider how they characterize workforce management decisions both internally and publicly.

Marin v. Dave & Buster's Inc.

Beyond ERISA 510: ACA Retaliation Provisions

ACA Anti-Retaliation provisions prohibit employers from discharging or discriminating against an employee because the employee:

- received a premium tax credit or a cost-sharing reduction at an Exchange, or
- provided (or is about to provide) information to the employer, federal government, or any state attorney general relating to a violation or an act or omission that the employee reasonably believes is a violation of any provision of Title I of the ACA.

Marin v. Dave & Buster's Inc.

Proper Workforce Management

- Between Sections 502 and 510 of ERISA and the ACA whistleblower provisions, the potential risks with reducing workforce hours in response to costs and taxes under the ACA can be daunting.
- Yet, the cost savings of proper workforce management may outweigh the risks, and properly executing such workforce management in a way that avoids retaliation and discrimination risks is a goal worth significant and deliberate consideration.

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