

Employee Benefits Update For The HR Professional

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DFW ISCEBS Monthly Educational Event
November 10, 2022

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- Attorney for more than 35 years
- Former chair of the ERISA Committee of the State Bar of Texas Tax Section
- Selected Community Service: UT Southwestern Medical School, KCBI, MATA, Broadway Dallas
- Leadership Dallas
- SMU Dedman School of Law
- Texas Tech University
- Married to Sheila

Topics That We Will Cover

- Preparing for Year End and 2023
- Court Cases
- DOL Highlights From 2022
- IRS Highlights From 2022

Limit	2022	2023
Compensation	\$305,000	\$330,000
Elective Deferrals	\$20,500	\$22,500
Catch-Up	\$6,500	\$7,500
Highly Compensated Employee	\$135,000	\$150,000
Annual Addition	\$61,000	\$66,000

Preparing for Year End and 2023

- Year end notices
- Vendor fees
- Committee minutes
- Cybersecurity
- Cares Act Discretionary Amendments
- RFPs
- Operational Compliance Check

Court Cases--Supreme Court

Hughes v. Northwestern University

- Duty of prudence turns on the circumstances prevailing at the time the fiduciary acts.
- Appropriate inquiry will necessarily be context specific
- Fiduciaries have a duty to monitor all plan investments and to remove any imprudent ones within a reasonable time
- Circumstances facing an ERISA fiduciary implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise

Fiduciary

- Named
- Functional
 - Exercises authority or control respecting management or disposition of the plan's assets
 - Exercises discretionary authority or discretionary control respecting management of the plan
 - Has discretionary authority or discretionary responsibility in the administration of the plan

ERISA Claims

- Prudence—Requires a fiduciary to discharge her duties with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with the matters would use
- Loyalty—Requires a fiduciary to discharge her duties with respect to a plan solely in the interest of the participants and beneficiaries, with the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan

Albert v. Oshkosh

Careful Context-Sensitive Scrutiny

- Lawsuit against 401(k) fiduciaries dismissed based on the pleadings
- Court wrote that pleadings asserting an ERISA breach of fiduciary duty for excessive fees and underperformance must describe a factual context showing the validity of the comparisons between the plan's expenses and expenses of other plans
- Comparability to a meaningful benchmark is required
- Failure to obtain RFPs is not sufficient

Matousek v. MidAmerican Energy Company

Excessive Fees: Meaningful Benchmark

- Sources of fee information
 - 404(a)(5) participant disclosure
 - Form 5500
- Total fees between \$326 and \$526 per participant per year
- Meaningful comparisons
 - NEPC Report
 - 401K Averages Book

Smith v. CommonSpirit Health

Active vs. Passive Funds

- Active—Portfolio manager actively makes investment decisions and initiates buying and selling of securities in an effort to maximize return
- Passive—A fixed portfolio structured to match the overall market or a preselected part of it that requires little to no judgement
- For example, \$100,000 invested at a 5% growth rate would generate \$265,330 in 20 years, but with a 1% management fee it becomes \$219,112 in 20 years, or 17% less

Smith v. CommonSpirit Health

Active vs. Passive Funds

- Fidelity Freedom Funds
 - Actively Managed
 - Index Funds
- While participants retain the right to choose which fund is appropriate for them, the plan must ensure that all fund options remain prudent options
- Showing of imprudence does not come down to simply pointing to a fund with better performance

Forman v. Trihealth, Inc.

Share Classes

- Offering more expensive mutual fund shares when identical shares are available at a lower cost with
 - Same investment strategy
 - Same management team
 - Same investments
- Retail share class and institutional share class
- Plausibly states a claim for breach of the ERISA fiduciary duty of prudence

Pizarro v. The Home Depot

Putting it all Together and Doing it Right

- Home Depot had an investment committee and an administrative committee that
 - Met quarterly, received reports, discussed performance
 - Adopted an investment policy statement
 - Selected and monitored plan investments
 - Kept minutes
 - Used Experts

Pizarro v. The Home Depot
Putting it all Together and Doing it Right

- A fiduciary must vigorously and independently investigate the wisdom of an investment through a process that is intensive and scrupulous and discharged with the greatest degree of care that could be expected under all the circumstances

Holmes v. Baptist Health South Florida, Inc Mandatory Arbitration and Class Action Waivers

- Court enforced a mandatory arbitration and class action waiver
- Arbitration provision was valid as to the Plan's breach of fiduciary duty claims being pursued by the plaintiffs
- Arbitration provision was also effective as to current and former participants

Markham v. VALIC

Back-End Loads/Surrender Fees

- Dentist office challenged a \$20,000 surrender fee assessed and collected by Valic
- Fees were under a Group Fixed and Variable Deferred Annuity Contract that Valic issued to fund the Markham retirement plan
- 5% surrender charge on transfers out of the contract on amounts contributed within the least 5 months

Walsh v. Alight Solutions

DOL and Cybersecurity

- Outgrowth of 2019 investigation by DOL involving processing of unauthorized distributions of plan benefits due to cybersecurity breaches in ERISA plan client accounts
- DOL said that Alight failed to report, disclose and restore those unauthorized distributions.
- Alight denied any knowledge of unauthorized distributions
- DOL's initial document request covered 32 categories of documents over a 4-year period
- Alight complained that compliance with the DOL request would require "thousands of hours of work"

Walsh v. Alight Solutions

DOL and Cybersecurity

- Courts will enforce an administrative subpoena if
 - The inquiry is within the authority of the agency
 - The demand is not too indefinite
 - The information sought is reasonably relevant
- Restrictions may be imposed where compliance would impose an unreasonable or undue burden on the party from whom production is sought

Disberry v. Colgate-Palmolive

Fiduciary Liability & Cybersecurity

- Paula worked for CP for approximately 11 years and had \$750,000 in her 401(k) balance
- She left CP in 2004 but left her money in the 401(k) plan
- In 2020 she tried to access her account balance but was told that it had been distributed
- She discovered that she had been the victim of cyber fraud
- She is seeking return of her money from CP, Alight (recordkeeper) and Bank of New York Mellon (trustee)

Burke v. The Boeing Company

Effective Use of an Independent Fiduciary

- 2007--Boeing appointed Newport Trust Company as the independent fiduciary of the Boeing company stock fund in Boeing's 401(k) plan
- Newport had the exclusive fiduciary authority and responsibility to determine whether continuing investments in the Boeing company stock fund was prudent
- 2019--Plaintiffs filed suit against Boeing arising out of the two crashes that caused Boeing's stock value to drop
- Plaintiffs argued that Boeing had a fiduciary duty under ERISA to disclose all that they knew about the crashes and the failure to do so resulted in the losses
- The Court held that the Independent Fiduciary was responsible for the Boeing company stock fund investments and that Boeing has no disclosure obligation

DOL—Auditor Independence Interpretive Bulletin 2509.2022-01

- Interpretive bulletin relating to guidance on independence of account retained by employee benefit plan
 - Update of previous guidance issued in 1975
 - More flexible rules for public companies
 - Promote access of employee benefit plans to highly qualified auditors and audit firms

DOL—Cryptocurrency

Compliance Assistance Release No. 2022-01

- Serious concerns about the prudence of a fiduciary's decision to permit plan investments in cryptocurrencies
- Significant risks and challenges
 - Fraud
 - Theft
 - Loss

DOL—ESG Investments

- New ESG investing regulations are expected in November
- May allow consideration of sustainability and climate change in management of investments for DB plans
- Similar possibilities for target date funds in DC plans
- Considerations involved in adding an ESG fund to your 401(k) plan or requiring all funds to pass some level of ESG scrutiny
 - Investment policy statement
 - Monitoring
 - Benchmarks
 - Meaning of ESG

DOL—PEP Fidelity Bond

- ERISA's fidelity bonding requirements do not apply to employees of employers participating in a pooled employer plan who assist in collecting and transmitting participant contributions from their employers to the PEP
- DOL Information Letter to William E. Heinbokel, September 7, 2022

DOL—Protecting Participant Interests

- DOL recovered \$131.8 million in a settlement from Wells Fargo and GreatBanc Trust Company
- Involved overpayments made by the Wells Fargo 401(k) plan for company stock purchased by the plan
- Wells Fargo agrees to pay \$13.2 million as a penalty to the DOL
- Great Banc agreed that it would not act as a fiduciary to any public company in certain transactions involving non-public stock

IRS—Third Party Loans From Plans Issue Snapshot—August 2022

- IRC and ERISA do not prohibit use of plan assets to make third party loans
- Consider plan or trust document restrictions
- Other considerations
 - Prohibited transactions
 - Exclusive benefit violation
 - Asset valuation
 - Minimum funding
 - Income tax issues
 - Fraud

IRS—Plan Documents

- Cycle Three restatements were due July 31, 2022
- Discretionary amendments for 2022 must be made by December 31, 2022
- Remedial Amendment List—amendments required by the end of the second calendar year after the year the item is identified on the RAL
- Operational Compliance List

IRS—Plan Documents

IRS Notice 2022-33

- SECURE Act and CARES Act Amendments
- Amendment deadline delayed to December 31, 2025
- Amendment deadline not delayed for CARES Act optional provisions related to
 - Coronavirus-related distributions
 - Increased loan limits
 - Extended loan repayment periods

IRS—RMD Relief From the New 10-Year Rule

IRS Notice 2022-53

- The SECURE Act amended the RMD rules to provide that distributions after the death of a participant must be made within 10 years
- An exception applies for distributions to spouses, a child under age 21, disabled or chronically ill individuals, and beneficiaries who are not more than 10 years younger than the participant
- At least as rapidly rule—delayed until 2023

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