Top Ten Employee Benefits Topics of 2018

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Reporting and Disclosure Developments to Watch

- Proposed moves towards streamlined and electronic disclosures
- ERISA Advisory Council
  - “Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors”
- Receiving Electronic Statements to Improve Retiree Earnings (“RETIRE”) Act, H.R. 4610
- Executive Order on Strengthening Retirement Security in America
And From Washington...

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Pension Benefit Guaranty Corporation
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Who is a Fiduciary?

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Loss Causation: Whose Burden?

- 4th, 5th, and 8th Circuits: When ERISA plaintiff proves fiduciary breach and prima facie case of loss to the plan, burden shifts to fiduciary to prove that loss not caused by the breach.

- 6th, 9th, 10th and 11th Circuits: Plaintiff must prove losses to plan resulting from alleged fiduciary breach.

Courts routinely hold that state privacy causes of action related to data breaches in connection with plans are not preempted.

- Generally no complete preemption due to independent legal duty under state law.
- Occasionally, courts also hold no express/conflict preemption because alleged data breach not premised upon plan administration.
Preemption: State PBM Regulations

- 8th Circuit struck down Ark. regulation of PBMs due to impermissible “reference to” ERISA/ERISA plans in PCMA v. Gerhart.
  - Previously struck down similar Iowa law (PCMA v. Rutledge).
  - Petition for writ of certiorari pending.

- However, District Court in North Dakota held that N.D. law regulating PBMs not preempted.
Plaintiff must have both statutory \textit{and} constitutional standing:

- Statutory Standing: Must fall within the class of plaintiffs whom Congress has authorized to sue under the statute. \textit{Lexmark Int'l, Inc. v. Static Control Components, Inc.}, 572 U.S. 118 (2014).

- Constitutional Standing (Article III): Must establish: (1) an injury-in-fact; (2) a causal connection between the injury and the ERISA misconduct; and (3) a likelihood that the injury will be redressed by a favorable decision in the plaintiff’s favor. \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555 (1992).
Standing

▶ Welfare Plans: Do participants have standing where a medical provider is assigned the rights to any recouped benefits?

▶ See Springer v. Cleveland Clinic Emple. Health Plan Total Care, 900 F.3d 284 (6th Cir. 2018) (participant had standing despite not alleging financial loss).

▶ Defined Contribution Plans: Do participants have standing as to investments and services in which they did not invest or use?

▶ See Wilcox v. Georgetown University, 2019 WL 132281 (D.D.C. Jan. 8, 2019) (plaintiff lacked standing as to investment in which he never invested); but see Larson v. Allina Health Sys., 2018 WL 4700332 (D. Minn. Oct. 1, 2018) (plaintiffs had standing as to brokerage window they did not use).
Defined Benefit Plans: Do participants have standing where the plan is not underfunded?

*Thole v. U.S. Bank, N.A.*, 873 F.3d 617 (8th Cir. 2017) (plaintiff lacked statutory standing where plan became overfunded during course of litigation).

Petition for Certiorari filed June 22, 2018 and the Supreme Court has requested the Solicitor General’s view of issue.

For more on standing attend the Civil Procedure & General Litigation Update today at 11:45 a.m.
Three-Year Statute of Limitations

- SOL for breach of fiduciary duty claim: “three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.”

- 401(k) Fees and Investment Selection Litigation
  - Courts finding that “actual knowledge” requires knowledge of the process for selecting and retaining investment options.
  - Courts finding that “actual knowledge” requires only disclosure of expense ratios, recordkeeping fees, etc.

- Stock Drop Litigation
  - Court finding that “actual knowledge” requires knowledge of gravity of company’s problems.
Determining Employer Withdrawal Liability: To calculate withdrawal liability, ERISA requires the use of actuarial assumptions and methods which,

- in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations); and

- in combination, offer the actuary’s best estimate of anticipated experience under the plan.
Recent Litigation Involving the Segal Blend

- **Minimum Funding Rate** – rate used by plan to calculate minimum required funding (e.g., 7.5%).
- **PBGC Rate** – rates published by PBGC that are used in single employer plan terminations. A “proxy” for annuitization rates in the commercial marketplace. (3%-3.31%).
- **Segal Blend Rate** – a blend of the plan’s minimum funding rate and the PBGC rate (e.g., 6.5%) used by some plans to calculate withdrawal liability.
Recent Litigation Involving the Segal Blend

Key Issues in Determining Employer Withdrawal Liability

- Does ERISA require actuaries to use identical actuarial assumptions for purposes of calculating minimum funding and withdrawal liability?

  - Supreme Court has said that the use of inconsistent assumptions may be attacked as presumptively unreasonable. Concrete Pipe & Prod. of Cal., Inc., v. Constr. Lab. Pension Tr. for S. Cal., 508 U.S. 602, 113 (1993).

- Generally, the higher the rate used by the actuary the lower the amount of withdrawal liability.
Recent Litigation Involving the Segal Blend


- Reversed Arbitrator’s decision upholding Fund’s use of the Segal Blend rate (6.5%).
- Fund actuary had testified that the higher 7.5% assumption was her “best estimate” of how the Fund’s assets would perform over the long term, and that she had calculated the Segal Blend rate without regard to the Plan’s actual portfolio of assets.
- Court cited the actuary’s testimony, “untethered composition” of Segal Blend, and lack of sufficient analysis by arbitrator.
- Use of Segal Blend not prohibited as matter of law.
Recent Litigation Involving the Segal Blend

- *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund (D. New Jersey, 2018)*
  - ERISA permits the use of different rates for calculating minimum funding and withdrawal liability.
  - Upheld use of Segal Blend rate:
    - “Best estimate” as a procedural standard defers to actuarial expertise;
    - Evidence supported Arbitrator’s determination that the actuary permissibly took a conservative risk-adjusted stance when using the discounted Segal Blend rate.
Collective Bargaining and Employee Benefits: Post-Tackett Developments

- Retiree health benefit cases continued to be litigated after the Supreme Court issued its decision in M&G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015):
  - Barton v. Constellium Rolled Products-Ravenswood, LLC, 856 F.3d 348 (4th Cir. 2017)
  - Cole v. Meritor, 855 F.3d 695 (6th Cir. 2017)

So what’s next?