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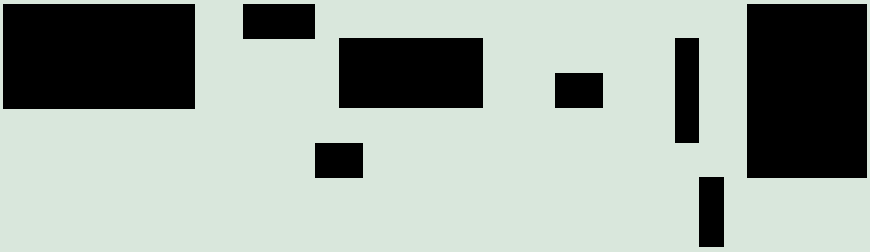

Insider

Supreme Court docket loaded with ERISA cases

By Alec Dike, Stephen Douglas, Bill Kalten, Drew Kusner and Maria Sarli

The U.S. Supreme Court will weigh in on several ERISA cases next term, with decisions expected by midyear 2020. Depending on the outcomes, plan sponsors and fiduciaries could see a significant increase in fiduciary breach lawsuits.

Defined benefit plan standing

The Supreme Court is being asked to rule on whether plan participants in an overfunded defined benefit (DB) plan can sue over alleged fiduciary misconduct even where there is no imminent risk of financial loss.

DB plan participants are guaranteed a fixed periodic payment at retirement regardless of the plan's investment outcomes. In Thole v. U.S. Bank, N.A., participants in the bank's DB plan allege that adopting an overly risky, undiversified investment strategy that caused the plan to become underfunded constituted a breach of fiduciary duty and violated ERISA's prohibited transaction rules.

While the litigation was ongoing, the value of plan assets increased and the plan became overfunded (primarily through additional contributions), so the district court dismissed the claims as moot. The Eighth Circuit dismissed the claims as well, but on the grounds that plan participants lacked the statutory standing to assert breach of fiduciary duty under ERISA in an overfunded plan because "there is no 'actual or imminent injury to the Plan itself.'"

Implications

The Supreme Court will look at the Eighth Circuit's ruling as well as Article III standing, which "requires a concrete injury even in the context of a statutory violation."[1] If the court allows fiduciary breach claims without actual economic injury to continue, it could result in an increase in DB plan fiduciary litigation, similar to the rise in fiduciary claims against defined contribution (DC) plans over the past two decades. DB plan fiduciaries could face additional scrutiny over investment decisions whenever equity markets decline. As a result, DB plan fiduciaries may wish to review committee charters, investment policies and other plan governance documents to ensure that fiduciary actions and decisions are consistent with these materials and are documented appropriately.

In This Issue

Pleading standard in stock-drop cases

The Supreme Court will consider whether *Fifth Third Bancorp v. Dudenhoeffer's* "more harm than good" pleading standard in stock-drop cases[2] can be satisfied by allegations that the harm to a company's stock price from an inevitable disclosure of alleged fraud generally increases over time.

Courts have struggled with the conflicts created under ERISA and securities law when DC plans invest in company stock. How can a participant demonstrate that an investment in company stock is imprudent when it's required under plan terms? And how should a prudent fiduciary act having "inside" (that is, nonpublic) information that will reduce the value of company stock but can't be disclosed under securities law?

While the established standard had been to grant fiduciaries a presumption of prudence regarding investment in company stock, the Supreme Court adopted a new standard in 2014 in *Fifth Third Bancorp v. Dudenhoeffer*: To claim a breach of the duty of prudence on the basis of inside information, the

[1] 2016 Supreme Court ruling in *Spokeo, Inc. v. Robins.* Article III constitutional standing is a prerequisite to commencing any action in federal court.

[2] In stock-drop cases, employee stock ownership plan (ESOP) participants sue plan fiduciaries when company stock prices drop, usually claiming that the company should have sold the stock earlier based on available information.

claimant must show the availability of an alternative action that was consistent with securities laws and that a prudent fiduciary would not have viewed as more likely to harm the plan's trust fund than to help it.

In **Retirement Plans Committee of IBM v. Jander**, participants in the IBM 401(k)/ESOP allege fiduciary duties were breached through continuing investment in IBM stock after it was known or should have been known, based on nonpublic information, that the stock price was artificially inflated by alleged accounting irregularities at IBM's microelectronics unit. The complaint was dismissed in district court but reversed on appeal by the Second Circuit.

Implications

If the Second Circuit's decision stands, it will likely encourage further stock-drop litigation, increase the costs to defendant fiduciaries of this litigation and encourage settlement of these cases to avoid costly litigation. It could also require plan fiduciaries to consider earlier disclosures of inside information to limit potential litigation.

Sponsors of DC plans that invest in employer stock should consider taking steps to limit the fiduciary exposure of the company and its officers and directors, including:

- Eliminating or capping the maximum percentage allowed in a stock fund (usually through grandfathering current percentages and restricting new contributions and transfers)
- Providing education and managed account services to participants
- Confirming that a stock fund is an ESOP

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Sponsors of DC plans that invest in employer stock should consider taking steps to limit the fiduciary exposure of the company and its officers and directors.

- Reviewing and revising fiduciary designations to avoid having senior officers and directors with access to inside information from serving as plan fiduciaries
- Confirming that fiduciaries have a prudent process for monitoring investments
- Educating fiduciaries on their responsibilities
- Appointing an independent fiduciary to monitor investments with authority to suspend trading and liquidate the stock fund

'Actual knowledge' under ERISA's three-year statute of limitations

The Supreme Court is being asked to decide whether the three-year statute of limitations in ERISA section 413(2), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars a participant lawsuit where the sponsor disclosed all relevant information more than three years before, but the participant chose not to read or could not recall reading the information.

Under ERISA section 413, a claim for breach of fiduciary duty must be brought by the earlier of: 1) six years from the date of the last action that constituted a part of the alleged breach or violation (or, in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation); or 2) three years after the earliest date that the plaintiff had "actual knowledge" of the alleged breach or violation.[3] ERISA does not define "actual knowledge," and courts have established a variety of approaches to determine whether and when a plaintiff has actual knowledge of an alleged breach or violation.

In **Sulyma v. Intel Corporation Investment Policy Committee**, the plaintiff, a former Intel employee, alleges the Intel Retirement Plans Investment Policy Committee breached its fiduciary duty by, among other things, altering the investment composition of certain Intel funds, which allegedly increased the plan's risk profile. Although the plaintiff received targeted emails disclosing these decisions and regularly accessed the website containing investment materials, he testified that he was unaware of the information.

The district court ruled that the plaintiff's claims were barred by ERISA's three-year statute of limitations, but the Ninth

[3] Additionally, in the case of fraud or concealment, claims can be brought up to six years after the discovery of the breach or violation.

Circuit overturned that decision, holding that the phrase "actual knowledge" means the participant is actually aware of the facts constituting the breach, not merely that those facts were available to the participant.

Implications

A Supreme Court decision may establish a uniform interpretation of ERISA's "actual knowledge" standard. If the court adopts the Ninth Circuit's position, it will be difficult for ERISA plan fiduciaries to prove participants received and read plan information — including required disclosures under ERISA — effectively nullifying the effect of the three-year limitations rule. The only recourse available to fiduciaries might be to request that all participants explicitly acknowledge reading and understanding the relevant disclosures, which is likely to increase plan administration costs.

The only recourse available to fiduciaries might be to request that all participants explicitly acknowledge reading and understanding the relevant disclosures.

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IRS expands preventive care coverage for chronic conditions for HSA participants

By Anu Gogna and Ben Lupin

In Notice 2019-45, the IRS expands preventive care coverage for health savings account (HSA)-eligible high-deductible health plans (HDHPs) to include more services for some chronic conditions. Until now, preventive care could not include services or benefits for existing illnesses, injuries or conditions. The notice took effect on July 17.

Under the tax code, HSA participants must be covered under an HDHP and must meet the HDHP deductible before becoming eligible for benefits, *with the exception of preventive care.* The new guidance considers the following items and services for chronic conditions to be preventive care:

- Beta blockers for congestive heart failure or coronary artery disease
- Angiotensin converting enzyme inhibitors for congestive heart failure, diabetes or coronary artery disease
- Anti-resorptive therapy for osteoporosis and osteopenia
- Blood pressure monitor for hypertension
- Inhaled corticosteroids and peak flow meter for asthma
- Insulin and other glucose lowering agents for diabetes
- Retinopathy screening, glucometer and hemoglobin A1c testing for diabetes
- International normalized ratio testing for liver disease
- Low-density lipoprotein testing for heart disease
- Selective serotonin reuptake inhibitors for depression
- Statins for heart disease and diabetes

The notice is in response to President Trump's executive order directing the IRS and Treasury to expand the use and flexibility of HSAs and HDHPs. Plans are *not* required to cover the expanded list of preventive care services on a first-dollar basis (that is, without cost sharing) under the Affordable Care Act's preventive services mandate.

Going forward

Employers with HSA-qualified HDHPs may add these preventive services to the list of those that are covered before HSA participants meet the HDHP deductible and should ensure that their third-party administrators are aware of the additions. The Treasury Department and the IRS, in consultation with Health and Human Services, plan to review the list of preventive care services and items every five to 10 years.

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Paid sick and safe leave laws continue to spread, and 'any reason' laws starting to emerge

By Cindy Brockhausen and Bill Kalten

Maine and Nevada have recently enacted groundbreaking laws that allow employees to use accrued paid leave *for any reason*. In other respects, the laws are structured similarly to the 35 state and local paid sick/safe leave (PSL) laws that have been enacted to date in 11 states (Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Rhode Island, Vermont and Washington) and 24 localities (including Washington, D.C., and Puerto Rico).

Below is a summary of the new paid "any reason" and paid sick leave laws since our last update.[1]

New paid 'any reason' leave laws

Under **Maine's** new leave law, employers with more than 10 employees working more than 120 days a year must offer one hour of paid leave for every 40 hours worked — up to 40 hours a year — which may be used for any reason. The law's structure is otherwise similar to other paid sick leave laws, although it is silent on a number of issues such as frontloading, carryover and reinstatement following rehire requirements. The paid leave mandate takes effect on January 1, 2021, and prohibits localities from enacting their own mandates.

Similarly, **Nevada's** mandate does not restrict paid leave to specific circumstances, and generally establishes accrual, frontloading, carryover, notice and reinstatement rules similar to those found in other paid sick leave laws. Employers with more than 50 employees must provide 0.01923 hours of paid leave for each hour worked (i.e., 40 hours a year for a 40-hour work week). The law takes effect on the later of January 1, 2020, or once implementing regulations and procedures are in place.

New paid sick leave laws and updates

The PSL law in **Dallas, Texas,** requires employers with more than 15 employees to provide one hour of paid sick leave for every 30 hours worked, up to 64 hours a year (employers with 15 or fewer employees must provide up to 48 hours a year). Accrued, unused leave must be carried over to the next year, subject to the 64- and 48-hour caps, unless employers frontload the yearly cap amount at the beginning of the year.

Absent a federal mandate, these laws and regulatory developments are expected to continue.

The law took effect on August 1, 2019, for employers with more than five employees and becomes effective on August 1, 2021, for employers with five or fewer employees; however, a lawsuit challenging the new law was recently filed.

Overruling earlier trial and appellate court decisions, the PSL law in **Pittsburgh, Pennsylvania,** was found to be constitutional by the state Supreme Court. The law requires employers with 15 or more employees to provide one hour of paid leave for every 35 hours worked, up to 40 hours a year (smaller employers must provide up to 24 hours a year, *unpaid* for the first year after the effective date). The original effective date was January 11, 2016, and a new effective date has yet to be established.

Westchester County, New York, has enacted a stand-alone paid safe leave law requiring employers to provide 40 hours of paid leave per year to victims of domestic violence or human trafficking. The leave may be used to attend or testify in criminal or civil court proceedings related to domestic violence or human trafficking, and to move to a safe location. This leave is *in addition to* leave provided under the county's recently implemented PSL mandate. The new law goes into effect on or around October 30, 2019.

San Antonio, Texas, enacted a law that, as currently written, requires employers with more than 15 employees to provide one hour of paid sick leave for every 30 hours worked, up to 64 hours a year, and employers with 15 or fewer employees to grant 48 hours per year. Employers with five or fewer employees are not required to comply until August 2021. Due to a legal challenge, the effective date for larger employers has been delayed until December 1, 2019 (from August 1, 2019). Revisions to the law are likely, as the lawsuit will resume if changes are not made by November 6, 2019.

For a current listing of all the states and localities with PSL and "any reason" laws, see the map on the following page.

[1] See "Expansion of paid sick leave laws expected to continue in 2019," *Insider*, January 2019.

Absent a federal mandate, these laws and regulatory developments are expected to continue.

Going forward

Employers in states and localities with PSL and "any reason" laws should review their leave policies and procedures to ensure they comply with the laws in their operational jurisdictions, and their payroll records properly track the accrual and usage of paid leave. Federal contractors must comply with **Executive Order 13706** and its related regulations.

Employers should be aware of potential changes to the PSL landscape, as jurisdictions such as Bernalillo County, New Mexico, have shifted gears from considering a PSL law

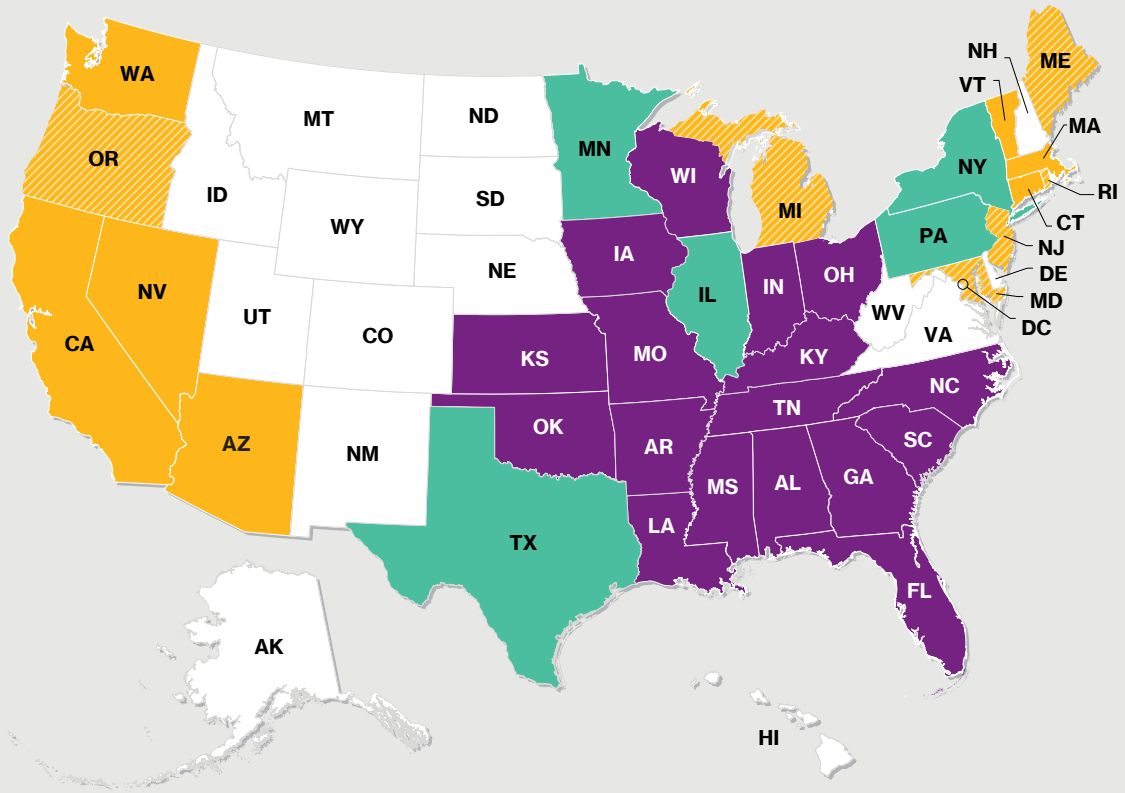
States/localities mandating paid sick leave

Arizona
California
Connecticut
Maine[1]
Maryland
Massachusetts
Michigan
Nevada[2]
New Jersey
Oregon
Rhode Island
Vermont
Washington
Washington, DC

California: *Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, Santa Monica*
Illinois: *Chicago, Cook County*[3]
Maryland: *Montgomery County*
Minnesota: *Duluth,*[4] *Minneapolis, St. Paul*

New York: *New York City, Westchester County*[5]
Pennsylvania: *Philadelphia, Pittsburgh*[6]
Texas: *Austin,*[7] *San Antonio,*[8] *Dallas*
Washington: *Seattle, Tacoma*

[1] Leave can be taken for any reason; effective January 1, 2021.
[2] Leave can be taken for any reason; effective January 1, 2020.
[3] Numerous municipalities have opted out.
[4] Effective January 1, 2020.
[5] Safe leave law effective October 30, 2019; paid sick leave law already in effect.
[6] Effective date not yet known.
[7] Effective date temporarily postponed pending a court challenge.
[8] Effective December 1, 2019 (August 1, 2021, for employers with fewer than six employees).



States with bans against local paid sick leave laws

Alabama
Arkansas
Florida
Georgia
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Michigan
Mississippi
Missouri
New Jersey
North Carolina
Ohio
Oklahoma
Oregon
Rhode Island
S. Carolina
Tennessee
Wisconsin

- States mandating paid sick leave (and the District of Columbia)
- States mandating paid sick leave and prohibiting local jurisdictions from legislating paid sick leave
- States with one or more localities (but not the state itself) that mandate paid sick leave
- States prohibiting local jurisdictions from legislating paid sick leave

August 1, 2019

to an "any reason" law, and New York City is considering expanding its existing PSL law to allow use of accrued leave for any reason.

As the number of these laws grows, multistate employers may wish to consider crafting a uniform policy that meets requirements in all their jurisdictions, although doing so could prove challenging as the laws in some jurisdictions could conflict with laws in others.

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IRS proposes relief to MEPs while DOL retains limits

By Stephen Douglas and Bill Kalten

A multiple employer plan (MEP) is an employee benefit plan adopted by two or more employers that are not members of an affiliated or controlled group. Benefit practitioners generally refer to two types of MEPs: a "closed MEP" and an "open MEP." Employers in a closed MEP must have some type of commonality (e.g., they are all in the same industry), whereas no such restriction applies in an open MEP.

Recently, the IRS issued **proposed regulations** to provide relief from the "one bad apple rule" for defined contribution MEPs (whether open or closed). Under the one bad apple rule, if one participating employer fails to meet a plan qualification requirement, then all participating employers are disqualified.

The proposed regulations respond to a **presidential executive order**, "Strengthening Retirement Security in America," directing the IRS and Department of Labor (DOL) to expand workplace retirement savings options. MEPs could expand retirement coverage by allowing employers, especially smaller ones, to share the costs of sponsoring plans.

The DOL has also responded to the presidential executive order by issuing its own final regulations that address defined contribution MEPs. Although these new rules expand the employers that can participate together in a MEP, they still do not allow for truly open MEPs.

IRS proposed regulations

The IRS is proposing to establish an exception to the one bad apple rule for defined contribution MEPs if the following conditions are met:

- The MEP administrator establishes procedures to comply with the Internal Revenue Code, including if there is a "participating employer failure." The MEP must not be "under examination" when it first notifies a participating employer of possible noncompliance.
- A series of three notices must be sent to the employer, with the first describing 1) a known or potential qualification failure, 2) necessary remedial actions, 3) the employer's option to initiate a spin-off, and 4) the consequences of the employer not taking any action. The final two notices are required only if an employer fails to take remedial action or initiate a spin-off.
- If the qualification failure is not remedied, the employer with the qualification problem can direct the MEP administrator to spin off its part of the plan to a separate plan or leave it to the MEP administrator to initiate a spin-off termination.
- The MEP administrator must comply with any information request by the IRS or a representative of the spun-off plan.

The IRS is accepting comments on the proposed regulations through October 1, 2019.

DOL final regulations

While the DOL's **final regulations**, effective September 30, 2019, continue to disallow open MEPs, they relax the commonality requirements somewhat with respect to defined contribution MEPs. As has been the case previously, participating employers in a MEP can continue to be within the "same trade, industry, line of business, or profession" and exist nationwide, or, under the new rules, they can be connected only geographically by having their "principal places of business in the same region that does not exceed the boundaries of a single state or a metropolitan area (even if the metropolitan area includes more than one state)." However, financial services firms (including retirement plan recordkeepers and third-party administrators) cannot establish a MEP. This provision is to help ensure that the employer association is not motivated by commercial interests.

The DOL is currently taking public comment on whether to broaden its rules to allow for truly open MEPs.

Going forward

Small and midsize employers interested in reducing administrative costs of defined contribution plan sponsorship may be comfortable proceeding under the new rules. Others, however, may want to wait to see whether the DOL further relaxes its rules or Congress passes pending legislation that will help promote open MEPs.

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