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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Top 10 Reasons To Have An ERISA Litigator On Speed Dial

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Nancy G. Ross

Nearly every large U.S. company, whether public or private, offers pension and welfare benefits to its employees. In the 40 years since the Employee Retirement Income Security Act was enacted, the courts and U.S.Department of Labor have generated a morass of confusing and inconsistent rules that companies, benefit plans and plan fiduciaries must follow. Trying to stay on top of these rules and opinions can be daunting and failure to do so can be expensive. Here are 10 reasons to regularly consult an ERISA litigator.

1. Heightened Supreme Court Interest in ERISA

Over the past five years, the U.S. Supreme Court has ramped up its interest in ERISA. The high court has significantly expanded the remedies available (e.g., CIGNA v. Amara), confirmed the right of employers to choose plan terms that place time bars on lawsuits (e.g., Heimeshoff), instructed courts on how they should preliminarily decide whether fiduciary breach lawsuits are valid (e.g., Dudenhoeffer) and determined the standards for contract interpretation over the vesting of retiree medical benefits (e.g., Tackett). Soon, the court will be deciding the scope of ERISA's time bar for lawsuits against fiduciaries (Tibble v. Edison International). Companies would be wise to evaluate the relevance of each of these pronouncements in administering their own benefit plans.

2. An Increase in DOL Investigations

The number of DOL investigations into pension plans has increased dramatically in recent years. These audits are often unfocused and protracted, with the DOL asserting that its enforcement authority is seemingly unlimited. An experienced ERISA litigator can help expedite the process, decide whether tolling agreements are warranted and identify and address any trouble spots. Equally important, experience has shown that with effective negotiation, the DOL often alters its positions.

3. New Standards of Fiduciary Prudence

What matters most in any plan administration is the process followed — not the decision reached. As courts have written, ERISA requires fiduciaries "to be prudent, not prescient." The best protection plan fiduciaries can have against a lawsuit is a carefully contemplated and followed process for making plan decisions. Recent court cases have resulted in large settlements, if not judgments, as a result of poor documentation of plan committee deliberations or an inability to show prudent decision-making.

4. Derisking Your Pension Liabilities

Trying to keep retirement plans adequately funded is a challenge when interest rates are low and capital markets are volatile. An emerging solution is the derisking of pension liabilities. Companies can liquidate uncertain liabilities by purchasing group annuity contracts to pay future benefits. Done correctly, derisking can be a win-win for employers and employees. But any company considering derisking must be mindful of the best practices to avoid litigation and enforcement actions.

5. Disclosures Matter

The past decade has shed light on how plans disclose the fees participants pay for investments and plan administration. Aggressive class counsel, often plaintiffs' securities firms, have made this area a focal point in recent years, filing nationwide class actions and extracting large settlements. On the heels of an uptick in litigation, the has DOL put into effect a new rule requiring plan fiduciaries to obtain detailed fee disclosures from service providers. Those disclosures may well prompt a new wave of litigation.

6. A New Definition for "Fiduciary"

Since ERISA was passed, courts have struggled with the threshold question of whether defendants named in a fiduciary breach lawsuit constitute plan fiduciaries. The result of this struggle has left little predictability as to whether boards of directors, CEOs or other senior officers named as defendants will be dismissed early or have to face the distraction of litigation. Compounding this conundrum is the DOL's recent attempt to broaden ERISA's fiduciary definition through formal rulemaking. While the extent of the DOL's success remains uncertain, this is a good time to review their structure, with an eye toward cordoning off the board and most senior officers from plan investment decisions.

7. Growing Conflict-of-Interest Claims in Benefits Litigation

In Glenn v. Metropolitan Life, the Supreme Court identified the circumstances in which discovery might be appropriate in benefits litigation. Prior to the high court's intervention, these benefits cases were typically handled without any discovery, with a court deciding, based only on the administrative record, whether the plan administrator's decision was reasonable. As a result of Glenn, plaintiffs' counsel routinely plead a conflict of interest by the plan administrator, opening the door to expansive (and expensive) discovery. Plans can reduce the breadth and cost of discovery demands by strengthening the plan language and internal procedures for deciding benefit claims.

8. Expansive Remedies in Litigation

Until the Supreme Court decided CIGNA v. Amara in 2011, relief in ERISA cases was generally limited either to the benefits owed or to equitable, nonmonetary remedies. In CIGNA, the high court revisited and reinterpreted its past precedents. Reflecting upon "equitable" remedies, the court identified three mechanisms that courts of equity traditionally used to exact monetary penalties, including a "surcharge" for harm suffered in unlimited amounts. Nearly every lawsuit since then seeks a surcharge, opening the door for plaintiffs' attorneys to demand a greater settlement or to seek a higher award.

9. The Risk of Attorneys' Fees in Lawsuits

The Supreme Court expanded the ability of participants to recover their attorneys' fees in benefits lawsuits. Prior to the high court's ruling in Hardt v. Reliance Standard Life, courts typically applied a "bad faith" standard to decide whether a party was entitled to fees under ERISA's discretionary fee provision. As a result of Hardt, courts now must award fees if there has been a reasonable degree of success by the participant. Courts have interpreted Hardt to entitle participants to recover attorneys' fees even when benefit determinations are only remanded to the plan administrator for further review. A prudent, documented and followed process for handling benefits can go far in achieving success in the courtroom and mitigating this risk.

10. The Dangerous ERISA Fiduciary Exception to Attorney-Client Privilege

Leaving the most troubling ERISA doctrine for last, this exception is a trap for the unwary. Courts have been slow in issuing applicable rulings, but those opinions that exist might be your most formidable opponent. Essentially, the doctrine holds that when legal advice is given for purposes of plan administration, the participants — and not the fiduciaries — are the beneficiaries of that advice. The result is that a fiduciary who obtains problematic or concerning legal advice may not be able to protect that advice from disclosure in court. Be wary!

—By Nancy G. Ross and Brian D. Netter, Mayer Brown LLP

Nancy Ross is a partner in Mayer Brown's Chicago office, where she is a member of the firm's employment and benefits group.

Brian Netter is a partner in Mayer Brown's Washington, D.C., office, where he is a member of the firm's Supreme Court and appellate practice group.

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