Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5 ERISA Cases To Watch This Fall

By **Emily Brill**

Law360 (August 8, 2018, 8:36 PM EDT) -- Attorneys who deal with the Employee Retirement Income Security Act should keep a close eye on proposed class actions against retirement plan record-keepers and universities in the last quarter of 2018, as well as a petition asking the U.S. Supreme Court to resolve a circuit split on when traditional pension plan participants can sue for breach of fiduciary duty, experts say.

Here, Law360 breaks down five cases worth watching this year.

403(b) plan cases versus UPenn, NYU, Northwestern

All eyes were on U.S. District Judge Katherine Forrest at the end of July. She had told New York University and a class of workers suing it over its retirement plan that she'd have her decision in their case by the end of the month, but July 30 passed without a new entry on the docket.

But true to her word, Judge Forrest released her decision in the first of the "403(b) plan cases" to go to trial on July 31, ruling for NYU on all counts.

The workers who sued NYU will now take their battle to the appellate level, where workers from two other elite schools, Northwestern University and the University of Pennsylvania, are now waging their ERISA fights.

Sacerdote v. NYU, Sweda v. University of Pennsylvania and Divane v. Northwestern University are significant because they give judges a chance to weigh in on what constitutes mismanagement of a 403(b) plan, a tax-deferred retirement plan that resembles a 401(k) plan but is intended for nonprofits, school districts, religious groups and governmental organizations.

Workers have accused the schools of allowing plan managers to charge too much for record-keeping services and make poor investment choices. The schools should have put one company in charge of record-keeping duties instead of several, and they should have forced the company to charge a flat fee rather than tying its fees to the size of the plan, the workers argue. They allege the schools breached their fiduciary duties of prudence and loyalty to plan participants in violation of ERISA.

The federal judges in all three cases said these allegations didn't hold weight, saying evidence suggested that the universities did a fine job of managing the plans. In any case, there wasn't enough evidence to say the universities acted imprudently when making decisions for the plans, the judges said.

"Plaintiffs have mostly been unsuccessful in challenging universities' management of their retirement plans, but some decisions have yet to reach trial or are being appealed," said Kurt Lawson, a partner at Hogan Lovells. "They are worth watching because the standards for administering 403(b) plans have not been well worked out, and any guidance through the process of getting these opinions is helpful."

Nancy Ross, the co-chair of the ERISA litigation practice at Mayer Brown LLP, said the case law generated from these 403(b) plan cases could affect the 401(k) arena as well.

"General pronouncements of ERISA fiduciary law are equally applicable to 401(k) plans," Ross said. "'What kind of meetings do you have to evaluate how the plan is being administered? Did you use a [request for proposal] process while selecting your advisers?'"

"Those are general principles of fiduciary governance, [so] through these cases, the court is handing down both specific instructions in law as well as general instructions in law," Ross said. "So these cases are applicable to the 401(k) world which is of course much larger [than the 403(b) world]."

Scott v. Aon Hewitt Financial Advisors LLC

In January 2017, Caterpillar Inc. workers got together to sue over purported mismanagement of their retirement plan — but they didn't sue Caterpillar.

Instead, they sued their 401(k) plan's administrator, Aon Hewitt, accusing it in a proposed class action of outsourcing its investment advising duties to a "robo-adviser" — a digital platform that provides algorithm-driven investment advice — even though that robo-adviser, Financial Engines Inc., allegedly charged excessive fees.

They said Aon Hewitt breached its fiduciary duties to 401(k) plan participants by failing to make good choices for the plan, and it engaged in ERISA-prohibited transactions by accepting a portion of the fees Financial Engines assessed from plan participants. The workers said those payments amounted to improper kickbacks.

Employees of Nestle SA and Ford Motor Co. sued their retirement plan administrators over allegedly improper contracts with Financial Engines as well, but both complaints were tossed, with judges finding the administrators were not fiduciaries.

The Caterpillar workers' case, however, presses on. The workers filed an amended complaint in June after a judge tossed their initial complaint in March.

Ross said it's worth keeping an eye on this case, because it's an "effort to make claims against the record-keepers and plan advisers."

"These are cases that have gone further to attack the privatized retirement plan structure in our nation, to not only challenge how the plan fiduciaries are running the plan but also challenge the record-keepers and investment advisers," Ross said. "I think we are at a real crossroads in our nation as to the direction that these repetitive challenges are going to take. ... For the past couple of decades, we've been playing whack-a-mole, where we put one [claim] to bed and then another one pops up."

R. Joseph Barton, the chair of Block & Leviton LLP's employee benefits group, said that plan administrators should face scrutiny for the decisions they make that affect retirement plan participants.

"If the plan participants would have gotten better services for less money, then you breached your fiduciary duties," Barton said.

Thole v. US Bank NA

It's not uncommon to hear legal arguments around ERISA described as "in the weeds." But as attorneys who take jobs in the field know, even the most complex, jargon-filled benefits cases have the potential to affect a lot of people.

Thole v. US Bank NA, which has been appealed to the Supreme Court, is one such case. The arguments are niche, but the potential impact is huge: This case could significantly erode workers' ability to sue their traditional pension plans for breaches of fiduciary duty.

Traditional pension plans, officially known as defined-benefit plans, guarantee workers a set amount of money when they retire using a formula that considers how long they've been with the company and their salary history.

For the past few years, defense attorneys have been arguing that workers don't have standing to file fiduciary-breach claims against traditional pension-plan managers unless the plan is underfunded. If the plan isn't underfunded, the workers haven't suffered harm, the argument goes, Cohen Milstein Sellers & Toll PLLC partner Michelle Yau said.

Yau represents the proposed class led by James J. Thole and Sherry Smith, who sued US Bank over its alleged management of their defined-benefit pension plan. They accused US Bank of engaging in a risky investment strategy that benefited the bank more than pensioners and ultimately failed, leaching $1.1 billion from the plan in 2008.

The plan wasn't fully funded when Thole and Smith sued. But US Bank transferred assets to the plan after the lawsuit was filed, fully funding it, then argued that the workers didn't have standing to bring the suit.

Accepting this argument, a Minnesota federal judge tossed the workers' claim. The Eighth Circuit upheld the dismissal on appeal.

Yau said now is the time to get answers on whether an ERISA plan participant can sue over fiduciary misconduct even when a defined-benefit plan isn't fully funded.

"There are all kinds of problems with the direction the courts are going," Yau said.

Barton said one of those problems is the fact that the courts seem to disregard the notion of nonfinancial versions of harm.

"If the fiduciaries steal money from the plan, as long as the plan is still adequately funded, the argument is, you have not suffered any individual harm, because the plan is able to pay everything you're entitled to," Barton said. "I think the fundamental thing that's the problem with the argument is harm under Article III [of the Constitution] is not necessarily monetary."

--Editing by Brian Baresch and Alanna Weissman.
