

MVP: Mayer Brown's Richard E. Nowak

By Irene Spezzamonte

Law360 (September 23, 2021, 4:46 PM EDT) -- Partner Richard E. Nowak successfully led a Mayer Brown LLP team representing Northrop Grumman in a case in which the Ninth Circuit found that calculating benefits is not a fiduciary function, earning him a spot among Law360's 2021 Benefits MVPs.

HIS BIGGEST ACCOMPLISHMENT THIS YEAR:

Nowak landed his most significant accomplishment of the year in April, when the Ninth Circuit unanimously ruled that Northrop Grumman did not breach its fiduciary duties under the Employee Retirement Income Security Act for not allegedly monitoring the miscalculations Hewitt Associates LLC — now known as Alight Solutions LLC — made.

The plan participants claimed that a faulty calculation resulted in lower monthly payouts, but the three-judge panel upheld a lower court's decision and dismissed the claims, finding that "the function being performed was not fiduciary in nature."

An opposite ruling "would have expanded fiduciary liability beyond what was contemplated by ERISA," Nowak said.

"Just because someone is considered a plan fiduciary in one context doesn't mean that everything he or she or the entity does is a fiduciary act, which is very important because not everything that is done on behalf of a plan or for a plan in terms of administration is a fiduciary act," he added.

HIS PROUDEST MOMENT FROM THE PAST YEAR:

A month before the Northrop Grumman case, Nowak had seen his proudest moment in 2021 when a federal judge examined a novel issue in a case where Shell Oil workers claimed the company sold confidential information to Fidelity Investments to market financial products.

The judge dismissed their claims, saying that participants' data are not assets under ERISA.



Nowak said data breach claims are novel issues that courts will continue to see, and the Shell decision set forth "a really important" precedent on "what constitutes a breach of fiduciary duty either on the plan fiduciary side or the service provider side."

"It's going to be interesting to see how other courts address that when these issues come up," he said.

HIS BIGGEST CHALLENGE THIS YEAR:

The Northrop Grumman case was just one example of the "proliferation of ERISA class actions" Nowak has seen in the past year, and keeping up with the large amount of ERISA-related actions filed in the country has become a real challenge for him.

"[We want to make] sure that we are tracking those properly [because] ultimately we want to make sure we are representing our client in a zealous manner and staying up to speed [...] is very important," he said.

The "cascade" of cases was caused by the complexity of benefits law, which is especially confusing for attorneys who don't practice it and judges who don't often handle such cases, Nowak said.

In some instances that led to "a number of courts across the country that have denied motions to dismiss, and those denials have sort of cascaded into more and more cases being filed," he explained, adding that the cascade "is not going away."

The costs of discovery in these cases are substantial, and as a result, parties reach multimillion-dollar settlements, Nowak said.

"Those settlements lead to more cases because the plaintiffs sort of understand that if they get past the motion to dismiss stage, they can put pressure on the defendants to say either we are going to spend millions of dollars to defend this, or we are going to pay to settle this and put it behind us," he said.

However, the coronavirus pandemic somehow helped, Nowak said, as he has been involved in more virtual hearings in the past year than he would have been when everything was in person.

Zoom hearings, for example, allow attorneys to explain more in-depth the concepts involved in a case, he said.

WHY HE IS A BENEFITS ATTORNEY:

Even though it has been 47 years since former President Gerald Ford signed ERISA into law, courts continuously address novel issues, especially in respect to how plan participants operate their plans.

"You don't see that in other areas of the law where things are more settled," Nowak said. "What I know today might be different from what I know tomorrow because something has changed or something new has come out."

The aspect of the benefits area of employment law that has changed the most is probably technology, he said, especially in how plan administrators communicate with plan participants.

HIS ADVICE FOR JUNIOR ATTORNEYS:

Whether by reading publications from service providers, consultants, or anyone who is not a lawyer, the

secret to success while an employment attorney is to "really immerse yourself" in the subject, Nowak said.

"That's how you really see the evolution of the development of 401(k) plans, other types of retirement plans, and how they all operate," he said. "Having that fundamental understanding is what helps you and what enables you to advise clients beyond just the run-of-the-mill legal advice."

— *As told to Irene Spezzamonte. Editing by Adam LoBelia.*

Law360's MVPs are attorneys who have distinguished themselves from their peers over the past year through high-stakes litigation, record-breaking deals and complex global matters. A team of Law360 editors selected the 2021 MVP winners after reviewing nearly 900 submissions.

All Content © 2003-2021, Portfolio Media, Inc.