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A "vaccine" for COVID-19 ERISA litigation

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ERISA litigation tends to spike when economic uncertainty or turmoil rises. Although many things contribute to this historically verifiable trend, it is easiest for employers to think about just two of them. First, an employer-sponsored retirement plan, like a 401(k) or pension plan, is likely to suffer from market volatility. Second, employer-sponsored health and welfare plans will see upticks in claims issues during a health crisis. A new virus requires treatment, and coverage (or no coverage) for novel treatments is sure to generate litigation.

Here are some key considerations and preventive measures that every plan sponsor and fiduciary can monitor and implement to avoid a COVID-19-related spike in ERISA litigation.

Retirement plans

Although the 401(k) is the most well-known type of retirement plan, there are also company-sponsored profit sharing plans, pension plans, and employee stock ownership plans. Each of these plans requires fiduciaries to monitor them, and the fiduciary obligation to administer plans prudently under the circumstances that presently exist does not disappear in a pandemic. Market volatility, consumer downturn, and the variety of corporate-level decisions addressing these issues (many of which are entirely justifiable and defensible), create breeding grounds for costly lawsuits that challenge investment decisions and disclosure obligations. As we saw during the Great Recession of 2007-09, these lawsuits often assert claims for breach of fiduciary duty.

- **Investment menu claims**
  - *Failure to diversify investments.* All good plans offer some form

of investment option designed to cater to participants seeking capital preservation. "Stable Value Funds" or "Target Date Funds" are the perfect choices for many participants due to age, risk tolerance, and other factors. But that does not stop plaintiffs from bringing claims that other options in turbulent times, like money-market options, are the more prudent choice, or that more options in exploding market segments, like pharmaceuticals, should have been on the list.

- *Improper choice of diversity.* Even the most wonderful array of investment options is not going to please all the plan participants all the time. Fund menus that add hedge funds, private equity or commodities-based trading options and the like will face criticisms for trying to offset one risk by allegedly creating too much risk somewhere else. And where there are risks (or even differences of opinions regarding what a "risk" is), lawsuits are an always-present option. Investment options with higher fees, greater volatility potential, or complicated value propositions are the targets here.

- *Expensive or self-dealing choices.* Some plans offer actively managed funds in lieu of index funds because, though index funds are often less pricey, actively managed funds can outperform the market in rough times and can be more attractive to some participants. Often, actively managed funds are alleged to be tied to a self-dealing incentive to the plan sponsor, the investment manager, or both, and a lack of prudence by the plan sponsor and fiduciaries for failing to see that the active management was generating excessive fees to the plan.

- **ESOP and company stock fund claims**

  - ESOPs and company stock funds get their own category because they consist only of the company stock. If the company is suffering, the value of the company stock will suffer. Typically, company stock will suffer even more than the stock market at large. Participant lawsuits sometimes attempt to put fiduciaries with special knowledge about the company in the uncomfortable position of navigating between laws requiring disclosure of important information to plan participants and laws forbidding insider trading.

- **Disclosure claims**

  - These claims typically involve what the plan participants allege they were told (or not told) relative to what the company knew and when the company knew it. Although not every event or decision is required to be reported or explained to participants, and plan communications to participants always require caution, keeping contact with plan participants and vendors is an area that can shore up an employer's defenses.

The vaccine: Monitor investments and vendors, and document your fiduciary decision process.

- Always monitor and regularly evaluate the fees charged by your investment managers and the funds.

- Consider whether to add or delete funds based on the investment policy and objectives, in light of the current conditions.

- Practice the "Three Ds" = Deliberate, Decide, and Document. When making investment decisions, document what you discussed and the reasons for making the decisions and choices you made. You are not judged by 20-20 hindsight, but by how well and how often you followed a reasonable and

prudent process. If you are in doubt about how to properly consider, document, or implement a policy, communications seeking advice from your attorney are generally protected from disclosure.

- Communicate responsibly with participants. Send the required account statements, and notices of any important changes. Encourage participants to use the educational or investment advisory services your plan offers.

- Review the distribution terms of your plans and stay in contact with your record keeper.

Special note about multiemployer (Taft–Hartley) plans

For employers who contribute to Taft-Hartley plans, now is a time to recognize that these plans typically have only three ways to add revenue: acquiring new members, receiving employer contributions, and lawsuits to collect contributions or for withdrawal liability. This means that employers can expect such plans, which still have to pay certain benefits now depending on their terms, will face funding challenges beyond those that were already affecting them before COVID-19. We expect claims alleging withdrawal liability and delinquent contributions to grow in the coming months, and have seen an increase in lawsuits nationwide in this area.

Health and other welfare plans

Most of the litigation arising under ERISA for health and welfare plans stems from the denial of benefits. These can be denials of long-term disability claims, denials of certain treatment options, or loss of coverage. They are defended based on the decisional process, the terms of the plan, and the peculiar facts of the case.

In the face of COVID-19, while some of the rules for deadlines and distributions for retirement plans have been relaxed under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, health and welfare plans face unique challenges regarding coverage issues and claims involving COVID-19 illness-related events. Very recently, the Employee Benefits Security Administration released **EBSA Disaster Relief Notice 2020-01**, which provides the following suggestions for fiduciaries:

- Act reasonably, prudently, and in the interest of the covered workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic well being.

- Make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments, and attempt to minimize the possibility of loss of benefits because of failure to comply with pre-established timeframes.

- Account for compliance roadblocks, and consider grace periods and other relief where appropriate, when physical disruption to a plan or service provider's principal place of business makes it impossible to comply with pre-established timeframes for certain claims decisions or disclosures.

The vaccine: Maintain contact with your third party administrator and be ready for more claims.

- The plan terms and claims decision process are always the paramount concerns. ERISA requires you to follow both, and the proposed ESBA guidance suggests that claims deadlines and other parts of the process must not be strictly applied.

- Here, too, the "3 D's" rule the day: Deliberate, Decide, and Document. If you follow the plan terms and process, while exercising the discretion the plan document should afford you, then you will be best positioned to deal with novel claims issues related to COVID-19. Understand that striving to maintain coverage and benefits for employees up front can save litigation expenses later.

Because this article is prescriptive, if you have questions or would like more information or education about fiduciary compliance and training, please reach out to the **Employee Benefits Practice Group**. If you are threatened or served with litigation, the **ERISA Litigation Practice Group** is here to help defend your business and employee benefit plans.

Need help with reopening?
Check out our **Coronavirus Return to Work FAQs** for the latest guidance. And more general information is available on our **Coronavirus Resource Center** page.