New Plaintiffs' Firms Bring Increased ERISA Litigation Risks for Employers

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Until recently, a small group of specialized plaintiffs' firms has dominated the ERISA class action space, beginning with untested theories of liability that are eventually leveraged into portfolios of lawsuits. Those portfolios (and the plaintiffs' attorneys who created them) have become well-known. But an interesting trend has emerged in the day-to-day ERISA litigation docket: new plaintiffs' firms have begun to enter the space in a significant way. This development, which has significant implications for plan sponsors and fiduciaries, has been picking up significant speed in the last several months.

The Retirement Plan Space

For example, in the retirement plan space, a core group of firms (many with securities class action pedigrees) kicked off a series of "stock drop" cases challenging the decision to offer investments in an employer's own securities as part of retirement plans. That group, joined by others, moved into a spate of broader challenges to 401(k) plan fee practices that have now moved into the 403(b) plan space and show no sign of slowing down. An overlapping group of firms has consistently asserted anti-cutback challenges to defined benefit plan changes, and some of the same firms went on to initiate a number of "church plan" lawsuits contending that certain plans are improperly categorized as religious "church plans" and are exempted from many retirement plan rules under ERISA. Another contingent continues to mount regular, vigorous challenges to ESOP transactions.

Health and Welfare

On the health and welfare side, a band of plaintiffs' firms similarly have established themselves as driving challenges to changes in retiree

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health care benefits; have targeted the entire health insurance industry's approach to reimbursement of out-of-network healthcare providers; and have challenged the way that health and disability insurance programs deal with specific treatments for mental health and other issues.

More Lawsuits

Those lawsuits made firm names like Keller Rohrback, Schlichter, Bogard & Denton, the former Lewis Feinberg, and a handful of others part of the vocabulary of retirement plan sponsors, fiduciaries, and defense lawyers. Recently, however, these established ERISA practitioners have been joined by new general practice lawyers who are following the roadmaps created by these firms and others. The consequences are predictable — more lawsuits, more scrutiny, and more risk — including growing litigation risk for smaller companies that previously were less-than-desirable targets in the initial waves of litigation.

ERISA Lawsuits

In ERISA, more than in many other areas, a theory that puts one employer at risk can often be applied across the board to a large swath of companies. Employers, and particularly large employers, tend to rely on the same groups of vendors, same types of plan structures and offerings, and similar policies across the industry. They also look to what their peers are doing as one benchmark for maintaining state-of-the art administration of their own plans. Thus, once a lawsuit targets a particular approach by one employer, chances are pretty high that the theory can be broadly applied to other employers.

First, established ERISA plaintiffs' firms have increasingly moved into one anothers' traditional territory. The defined contribution plan excessive fee action provides perhaps the most abundant illustration of this phenomenon; most of the best-known ERISA plaintiffs' firms are now maintaining sets of lawsuits that amount to significant investments of time and resources.

Second, maturing case law, high-dollar settlements, and well-developed case dockets that make plaintiffs' firm's work product readily accessible have considerably lowered the front-end investment needed for new firms to enter the ERISA class action arena. As a result, more general practice plaintiffs' firms that have traditionally focused on personal injury, products liability, and consumer class action litigation have begun to mount ERISA class actions.[1] They have joined the established firms in seeking potential named plaintiffs through social media ads, newspapers, and web sites.

What does this mean for employers that sponsor ERISA plans? Obviously, the more ERISA litigation proliferates, the more important it

is for plan sponsors and fiduciaries to make sure their plan administration takes into account the theories that are becoming fodder for class actions. One upside of the uptick in litigation has been that, as courts have moved toward consensus on some of the practices plaintiffs have challenged, they have provided valuable guidance that plan fiduciaries can take into account in plan administration. Overall, taking steps to make sure that fiduciary practices are being regularly reviewed and improved upon has never been more important.

The introduction of less ERISA-experienced counsel absolutely increases employer risk. Established plaintiffs' firms pick and choose somewhat predictable targets: those with deep pockets, often with plan features that can be readily challenged. As more players enter the scene, though, it is not just the largest companies that are at risk. Smaller employers, along with large employers whose plan profiles are not particularly complex or unusual, face increasing risk of being targeted in a lawsuit. More contingency-fee lawyers looking for clients and competing for cases and settlements inevitably means more cases that are filed against large, medium, and small employers alike.

Moreover, inexperienced counsel add unpredictability and, at times, expense to litigation defense. Newcomers to the area may not recognize their cases' weaknesses, precluding reasonable settlements at an early litigation stage. They also may advance arguments that more experienced counsel would avoid, but which employers still must defend against and result in costly research to be performed and briefs to be drafted. For example, these "new" ERISA lawyers may push harder in discovery, not recognizing ERISA's relatively plan-sponsor-friendly features that discourage those experienced in the area from pushing for broader-than-necessary discovery except in unusual circumstances. This can result, at a minimum, in more discovery fights, which quickly increase defense costs.

It would be a mistake to underestimate these new firms as they break into ERISA class actions. Less ERISA-experienced lawyers may lack the same background in arcane issues of statutory interpretation that some of their ERISA-focused counterparts have, but they bring their own strengths and experiences to the table — finding clients, explaining issues simply, telling compelling stories, and negotiating settlements. Also, many of these "new" ERISA lawyers are creatures of the courtroom who will have more trial experience than the ordinary ERISA lawyer. All of these traits will serve them well in pursuing ERISA class actions, particularly if they can leverage their general litigation skill sets to break down complex and sometimes boring fiduciary breach cases into stories that attract the interest of the courts.

Even more importantly, new players in the ERISA litigation space will inevitably drive innovation in liability theories. These new attorneys are smart, motivated, and will be working on new theories to propel ERISA class actions. As the field grows, new theories of plan sponsor liability will continue to emerge, some of which will eventually succeed in the

courts. This cycle will likely continue. New pioneers will build new types of cases and allow others to follow by suing broadly against a range of corporate defendants. In the ERISA litigation space, this cycle has driven new lawsuits for decades(first in retiree medical actions, then in "stock drop" cases, and more recently through excessive fee claims) and shows no signs of slowing down in the foreseeable future.

This increasing risk level for ERISA class actions is no boon to employees. The decision to offer most ERISA benefit plans is largely a voluntary one from the employers' perspective. Adding cost and risk to the decision-making matrix can only reasonably be expected to diminish employers' enthusiasm for offering such plans in the first place. According to a recent report from the Bureau of Labor Statistics, wages and salaries accounted for 68.3 percent of employers' labor costs, while benefit costs accounted for the remaining 31.7 percent.[2] Litigation costs, and litigation avoidance costs, raise the price of providing benefits to the employer without creating an equivalent direct increase in what employees receive. That is not to say, of course, that employees do not benefit from these lawsuits, but it is far from clear that the benefits to employees are anything like proportionate to the costs to employers.

Conclusion

For the moment, at least, it appears that employers should be prepared for the volume of ERISA class action lawsuits to continue to tick upward, placing a premium on learning and following best practice for day-to-day plan administration and management.

NOTES

1. Madia Law LLC of Minneapolis, Franklin D. Azar & Associates of Denver, Dreyer Boyajian LLP of Albany, NY, and the Michigan firm Sommers Schwartz Law Offices are some of the personal injury-oriented firms that have recently moved into the ERISA class action arena. Also worth noting is Stris & Maher, which began its ERISA practice with an impressive string of plaintiffs'-side Supreme Court victories and has now moved into healthcare provider litigation.

2. *See* United States Bureau of Labor Statistics, *Employer Costs for Employee Compensation*, December 15, 2017, available at *https://www.bls.gov/news.release/ecec.nr0.htm*.