
Don't Become a Statistic: ERISA Litigation Trends and Planning Steps You Can Take to Avoid Them

Presentation for:
Employee Benefits Academy
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Presentation by:
Anthony Eppert, Partner
Scott Nelson, Partner

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Upcoming 2021 Webinars

- **2021 webinars:**
 - **May 20:** Public Company ESOP Issues
 - **June 24:** Key Issues for HSAs, HRAs and FSAs
 - **July 22:** Employment and Benefits Issues in M&A Transactions
 - **August 26:** Basics and Update on IRS and DOL Correction Programs
 - **September 23:** Self-Directed IRAs and investments relating to the same
 - **October 28:** Navigating controlled group and affiliated service group rules
 - **November 18:** Year-End Benefit Plan Requirements/End of Year Benefits "To Do" List
 - **December 16:** Benefits Year in Review and a Look Ahead to the Upcoming Year

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Partner

Email:

anthonyeppert@HuntonAK.com

Phone: 512-542-5013

500 W. 5th Street

Austin, TX 78701

Tony's multi-disciplinary legal practice focuses on executive compensation, ESOPs and employee benefit arrangements (including their related tax, accounting, securities and corporate governance issues) in the United States and abroad. He leads the Firm's Compensation Practice Group.

Before entering private practice, Tony:

- Served as a judicial clerk to the Hon. Richard F. Suhrheinrich of the United States Court of Appeals (6th Circuit)
- Obtained his LL.M. (Taxation) from New York University
- Obtained his J.D. (Tax Concentration) from Michigan State University College of Law
 - Editor-in-Chief, Journal of Medicine and Law
 - President, Tax and Estate Planning Society

Scott Nelson



Partner

Email:

snelson@HuntonAK.com

Phone: 713-220-3654

600 Travis Street

Houston, TX 77002

Clients look to Scott to handle complex and mission-critical ERISA litigation matters on a nationwide basis. Scott is one of only a very few ERISA litigators nationwide who has taken a large ERISA litigation class action case to trial and won it. He achieved a total bench trial victory in Wyoming federal court for a multinational mining and chemical company in a nationwide ERISA class action in which plaintiffs sought in excess of \$200 million. He has several published ERISA litigation cases and has successfully defended clients in numerous unpublished ERISA litigation matters. For example, he recently obtained a very favorable, confidential settlement for one of the world's largest banks in top hat plan litigation with a former high-level executive.

Because Scott's litigation and trial experience extends beyond ERISA litigation, he brings unique perspective and fulsome strategic and tactical litigation, trial, and appellate methodologies to bear for the benefit of his ERISA litigation clients. Comfortable and compelling in the courtroom, Scott has prevailed for clients in cases ranging from simple labor arbitrations to jury and bench trials with hundreds of millions of dollars in potential liability exposure. He is known for his ease in working with clients, his thoughtful strategic approach, his artful use of diplomacy, and his relentless pursuit of victory.

Legal 500 has recognized Scott as a leading U.S. lawyer in Labor & Employment Litigation, Workplace & Employment Counseling, and ERISA Litigation. Scott is also ranked in Chambers, recognized as a Texas Super Lawyer, listed as one of The Best Lawyers in America, recognized as a Labor and Employment Star by Benchmark Litigation, and has been Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization since 2003.

ERISA Litigation Is On The Rise

- 2020 was a record-setting year for ERISA litigation
- An all-time record of just over 200 ERISA class actions were filed – an 80% increase from 2019 and over double from 2018
- The Supreme Court issued 4 ERISA opinions – more than it has ever issued in a single year
- Some trends emerged

- **Biggest contributor to the drastic increase in class actions in 2020:** Plaintiffs' firms started bringing these class actions against small plans and 401(k) fiduciaries
- **Common allegations:**
 - Not offering enough index funds
 - Offering underperforming funds or funds affiliated with the plan's record-keeper
 - Not using the lowest cost share classes of funds

- Did the plan sponsor follow a structured process, based upon the information available to it at that time, such that the plan sponsor's decision was prudent?
- A key is to have a strong **Investment Policy Statement** ("IPS") that sets forth a structured process, such is followed by the plan sponsor, and then carefully **document** such process and decision
 - Keep in mind that "process" is often much more important than the "outcome"
 - Whether the duty of prudence is satisfied is a "process" question based upon the information available at the time of the decision (*i.e.*, no 20/20 hindsight)
- A robust committee charter should be adopted

- As part of the process, the plan sponsor should:
 - Evaluate all forms of compensation that the 3rd party receives (including revenue sharing)
 - The aggregate fee received by the 3rd party should be benchmarked so as to determine that the aggregate amount is reasonable
 - The method of compensation to the 3rd party should be evaluated (*i.e.*, flat dollar amount, percentage of assets, revenue sharing, etc.)
 - Consider whether it makes sense to benchmark each fund's expense ratio to determine that such is reasonable
 - Every 3-5 years, send the plan out to bid
 - Choosing which funds to put into the line up

COBRA Notices - Litigation

- 2020 was a record-breaking year for the number of cases challenging the adequacy of COBRA notices
- Typically allege technical violations and focus on statutory penalties for failing to provide the required notices rather than having to establish harm
 - Ex.: COBRA notices that do not meet foreign language requirements or do not provide the address for payments (even if the addressed envelope is included)
- Low-cost, cookie cutter cases to file
- At least one has resulted in a settlement of over \$1,000,000
- Number likely to rise with Covid-19 layoffs

- There are **four COBRA notices** that must be provided, each of which have their own content requirements
- **Initial Notice** – Must be provided to each employee and covered spouse, must be provided within 90 days of coverage under the health plan, and contain content such as:
 - Contact information of the plan administrator;
 - General description of the continuation coverage;
 - Explanation of what QBs must do to notify the plan of qualifying events;
 - Stress the importance that participants & beneficiaries keep the plan administrator up to date on addresses; and
 - That more information can be found in the SPD or the plan

- **Election Notice** – Describing the rights to continuation coverage and how to make an election, and provide such to QBs. Content requirements include a list of 14 items, including:
 - Name, address and telephone number of the plan’s COBRA administrator;
 - Identify the qualifying event;
 - Identify the QBs by name or status;
 - Explain the right to elect coverage and how to elect such;
 - State the type of coverage and for how long;
 - How coverage could terminate early;
 - Premium payment requirements; and
 - Etc.

- **Two other COBRA Notices** include:
 - Notice of Unavailability of Continuation Coverage; and
 - Notice of Termination of Coverage
- **Model notices** are provided by the DOL

- **New Notices** - Additionally, new notices are required pursuant to the American Rescue Plan Act of 2021 that was signed into law by President Biden on March 11, 2021. As an overview:
 - The new law requires a temporary fully-subsidized COBRA coverage between April 1, 2021 and September 30, 2021
 - For those who are: (x) currently in COBRA, (y) those who were enrolled in COBRA and later dropped coverage, and (z) those who previously declined COBRA
 - The employer or the insurer pays the premiums and offsets the cost via a new federal tax credit
 - On April 7, 2021, the DOL issued a model notices, model election forms, and FAQs

- *Bartnett v. Abbott Laboratories, et al.* (N.D. Ill., Case No. 1:20-cv-02127)
 - Plan participant sued the plan, plan sponsor, plan administrator, and record-keeper for breaches of fiduciary duty under ERISA after her account was hacked
- **Consider:**
 - What response measures does the record-keeper have in place?
 - How does s/he test the response capabilities?
 - Are losses due to cyber theft covered by your insurance?

- Is personal data of a participant a plan asset?

- The EBSA division of the DOL set forth the following best practices for plan sponsors and service providers they hire:
 - Have a formal, well documented, cybersecurity program;
 - Conduct prudent annual risk assessments;
 - Have strong access control procedures;
 - Conduct cybersecurity awareness training;
 - Encryption;
 - Respond to cybersecurity threats; and
 - More

- The EBSA division of the DOL also set forth tips for hiring a service provider with strong cybersecurity practices

- Plaintiffs' firms are alleging that companies violate ERISA by using outdated information when calculating retirement benefits.
- Several types of assumptions are being challenged
 - outdated mortality tables used by some defined benefit plans and single-employer plans
 - multiemployer plans – withdrawing employers arguing plan actuaries inflate withdrawal liability by using different assumptions
 - interest rate assumptions could be next

- Under ERISA, a person is generally a fiduciary to the extent:
 - Such person is named in the ERISA plan document and is provided discretionary authority or responsibility over the administration of the ERISA plan (the “Named Fiduciary”)
 - Such person exercises any discretionary authority or control respecting the administration of the ERISA plan; or
 - Such person exercises any authority or control respecting management or disposition of the assets of the ERISA plan
- Qualified retirement plans generally have more than one fiduciary

- Fiduciary obligations are among the highest known to law
- Fiduciaries are generally subject to the following standards:
 - Act for the exclusive benefit of providing benefits and defraying reasonable expenses when administering the ERISA plan (*i.e.*, duty of loyalty);
 - Act with care, skill, prudence and diligence under the circumstances that a prudent person with similar capacity would use (*i.e.*, duty of prudence), applied using an expert standard;
 - Act in accordance with plan documents;
 - Act to diversify plan assets, unless such would be imprudent;
 - Must not knowingly participate in (or conceal) the breach of a co-fiduciary

- **2020 circuit split:** Are single-stock funds *per se* imprudent plan offerings?
 - **Fifth Circuit:** No - *Schweitzer v. Investment Committee of Phillips 66 Savings Plan*, 960 F.3d 190 (5th Cir. 2020)
 - **Fourth Circuit:** Yes - *Stegemann v. Gannett Co.*, 970 F.3d 465, 468 (4th Cir. 2020)
- **Upcoming cases in 2021 before federal judges in Texas and New Jersey:** Is an employee's confidential financial information a plan asset?

- *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2020)
 - Court declined to resolve the circuit split on pleading standard under *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014)
 - **Open question:** Are ESOP fiduciaries required to disclose information not required by federal securities laws?

- *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020)
 - **Held:** Defined benefit plan participants lacked standing to sue the fiduciary over management of the plan's investments because they were still receiving their benefits.
- **Developing district court split:** Do participants have standing to challenge investments in which they did not personally invest?

Fiduciary Breach - Litigation - Actual Knowledge

- *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020)
 - **Held:** The participant’s possessing plan documents and disclosures is not enough alone to show “actual knowledge” and trigger the 3 (instead of ERISA’s default 6) year statute of limitations.

- *Rutledge v. Pharm. Care Mgmt. Ass'n.*, 141 S. Ct. 474 (2020)
 - **Held:** ERISA did not preempt Arkansas law regulating PBMs.
 - **Rule:** State laws directly regulating self-funded plans are preempted, not those merely increasing costs or altering incentives for ERISA plans.
- 9th Circuit set to rule on California state law in 2021

Next Month's Webinars

Executive Compensation Academy

- Title: Is a Global Employment Company the Solution to Help Manage Internationally Mobile Employees?
- When: May 13, 2021
- Time: 10:00 am – 11:00 am CT
11:00 am – 12:00 pm ET

Employee Benefits Academy

- Title: Public Company ESOP Issues
- When: May 20, 2021
- Time: 10:00 am – 11:00 am CT
11:00 am – 12:00 pm ET

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Questions?