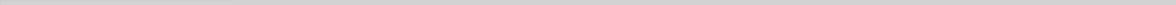
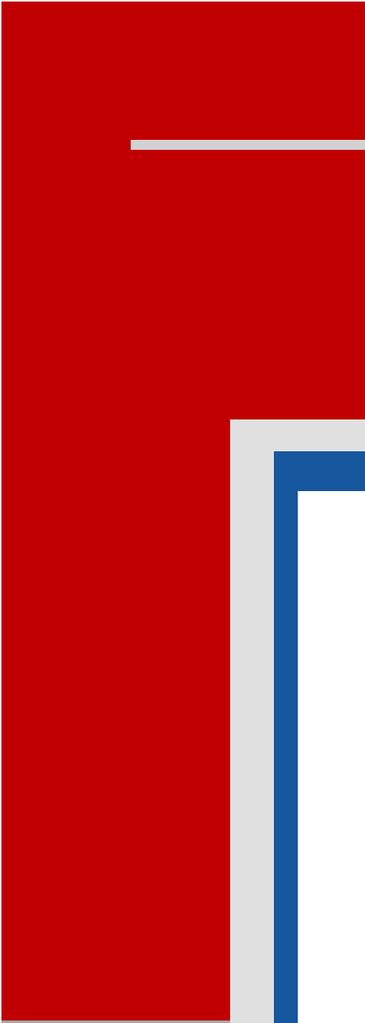




The MC Academy

The Employee Benefits and Executive Compensation Series

ERISA CLAIMS, LITIGATION AND LITIGATION AVOIDANCE



ERISA'S STATUTORY FRAMEWORK

ERISA's Remedial Scheme

- ◆ ERISA Section 502(a)(1)(A) / Section 502(c)
- ◆ ERISA Section 502(a)(1)(B)
- ◆ ERISA Section 502(a)(2)
- ◆ ERISA Section 502(a)(3)
- ◆ ERISA Section 510
- ◆ No common law or other state law claims against plans

Suits to Redress Failure to Provide Required Information

- ◆ ERISA Section 502(a)(1)(A) / Section 502(c)
 - Plan administrator required to produce information and documents in response to written request from participant or beneficiary
 - Covers broad range of information and documents
 - Examples: SPDs, governing plan documents, summary of material modifications
 - Failure to respond timely may result in \$110 penalty per day (court has discretion)
 - Educate HR and legal to watch for requests; docket deadlines; respond timely

Claim for Benefits: ERISA Section 502(a)(1)(B)

- ◆ Benefit claims
 - Claims for benefits under terms of the plan
 - Claims to clarify future benefits or rights under the plan
- ◆ Exhaustion of administrative remedies required
- ◆ Remedies are monetary relief (benefits) or declaratory relief (right to benefits)

Claims for Breach of Fiduciary Duty: ERISA Section 502(a)(2)

- ◆ Claims against plan fiduciaries
- ◆ Must seek to redress harm to plan
- ◆ Remedies include making the plan whole for a loss, or disgorgement of gain by fiduciary
- ◆ Recovery goes to the plan; no individual recovery

Catchall Provision: ERISA Section 502(a)(3)

- ◆ Suit to enforce ERISA or the plan
- ◆ May be brought by participant, beneficiary or fiduciary
- ◆ Remedy limited to “other appropriate equitable relief”
 - Examples: injunction, equitable restitution (against a fiduciary), accounting

ERISA's Anti-Discrimination Provision: ERISA Section 510

- ◆ Bars employers from taking adverse employment actions against individuals to interfere with the attainment of ERISA rights
- ◆ Bars retaliation against employees for seeking to exercise ERISA rights
- ◆ Examples:
 - Discharge to prevent retirement plan vesting
 - Discharge in retaliation for large medical claim
- ◆ ERISA Section 510 has no enforcement or remedial provision
 - Courts look to ERISA Section 502(a)(3) and ERISA Section 502(a)(1)(B)

More on ERISA Remedies

Participants' Limited Ability to Obtain Monetary Relief

- ◆ Obtain benefits under the terms of the plan
 - Not otherwise able to recover personal monetary relief
 - Example: misrepresentations about coverage
 - Remedies formerly limited to “equitable” remedies under ERISA Section 502(a)(3), which did not include money
- ◆ *CIGNA v. Amara*, a 2011 Supreme Court decision
 - “Surcharge” against fiduciary possible under ERISA Section 502(a)(3)
 - Opened the possibility plaintiffs could recover monetary relief from fiduciaries

Attorneys' Fees

- ◆ ERISA Section 502(g)(1) permits courts to award a “reasonable attorney’s fee and costs of action to either party”
- ◆ Not limited to “prevailing party”
- ◆ Can be awarded to party achieving some degree of success on the merits

Other Limitations on Remedies

- ◆ Consequence of preemption:
 - Only remedies are those expressly provided by ERISA
- ◆ No extra-contractual or consequential damages
- ◆ No punitive damages
- ◆ No other state remedies (preempted)

ERISA Parties: Impact on ERISA Actions

ERISA Parties: Who Winds Up In The Lawsuit?

◆ Plan parties

- Plan Administrator
- Plan Sponsor
- Participants and beneficiaries

ERISA Parties: Fiduciaries

- ◆ Named fiduciaries
 - Trustees
 - Plan Administrator
 - Plan Committees
 - Company and its Board of Directors
- ◆ Other fiduciaries
 - Investment advisors or managers
 - Discretionary claims administrators
 - Functional fiduciaries

ERISA Parties: Non-Fiduciaries

- ◆ Administrative parties
 - Record keepers
 - Non-fiduciary claims processors
 - Insurance brokers
 - Third party administrators
- ◆ Carriers
- ◆ Professionals
 - Actuaries and consultants
 - Attorneys
 - Accountants
- ◆ Medical providers

ERISA Parties: Governmental

- ◆ Secretary of the Treasury (IRS)
- ◆ Secretary of Labor (DOL)
- ◆ PBGC

ERISA Parties: Why Does It Matter?

- ◆ Determines scope of preemption
- ◆ Determines whether state claims in state court are viable
- ◆ Limits who may sue and standing to sue
- ◆ Determines available claims
- ◆ Determines available remedies
- ◆ Biggest determiner: fiduciary status

ERISA Preemption

What is ERISA Preemption?

- ◆ ERISA is supreme law of the land; supersedes state laws
- ◆ ERISA spells out the exclusive remedial scheme
- ◆ Purpose of preemption is to ensure uniformity and eliminate conflicting or inconsistent patchwork of state and local regulation

How does ERISA Preemption Actually Work?

- ◆ Gets you into federal court (complete preemption)
 - Removal to federal court even if no ERISA claim on face of pleadings
- ◆ Serves as a basis for dismissal of state law claims
 - State and local laws and claims that “relate to” an employee benefit plan are preempted

Statutory exceptions to ERISA preemption

- ◆ “Savings clause” – allows states to regulate traditional insurance carriers
 - By dictating contents of insurance contracts, including contracts purchased by insured ERISA plans, allows indirect regulation of insured ERISA plans
- ◆ **BUT**, ERISA’s savings clause only impacts fully insured plans
 - “Deemer clause” – ERISA plans cannot be “deemed to be an insurance company”
 - Practical effect: self-insured ERISA plans not subject to indirect regulation through the savings clause

Other exceptions to ERISA preemption?

- ◆ Suits between non-core parties
 - Providers suing administrators that have verified coverage or benefits
 - Provider suits under network agreements
- ◆ Non-ERISA claims
 - Suits under employment agreements
 - Suits involving non-ERISA severance arrangements
- ◆ Breach of duties independent of ERISA
 - Professional malpractice
 - Routine breach of contract claims (landlord/tenant suit)

ERISA Procedural and Evidentiary Issues



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Administrative Process: Exhaustion of Administrative Remedies

- ◆ Depending on the type of claim, claimant required to exhaust administrative remedies
 - Benefit claims must be exhausted
 - Depending on jurisdiction, statutory claims also must be exhausted, especially if duplicative of benefits claim
 - Courts split regarding Section 510 claims

What Does Exhaustion Mean?

- ◆ Claimant must follow plan's claims procedures prior to filing suit
 - Administrative claims procedures set forth in the plan documents
 - ERISA requires “reasonable claims procedures”
- ◆ Strict deadlines
 - Claimant's submission of claim and appeal(s)
 - Plan's determinations
 - Extensions allowed in certain circumstances
- ◆ Availability of external review in certain situations
- ◆ Necessity for expert opinions
 - Example: disputes regarding medical necessity

Exceptions to Exhaustion Requirement

- ◆ Failure to comply with the claims procedure
 - Non-compliance by plan → administrative remedies deemed exhausted → claimant may file lawsuit
 - Non-compliance by claimant → claim will be dismissed
- ◆ Futility
 - High standard
 - Argument that claim likely would have been denied not sufficient
 - Conflicts of interest not sufficient
 - Failure to include claim procedures in plan may result in futility finding
- ◆ Irreparable harm – imminent threat to life or health

Discovery Issues

- ◆ Limited or no discovery beyond administrative record (closed record)
- ◆ What is the administrative record?
 - Evidentiary record compiled by the plan administrator in connection with claim adjudication
 - Includes information submitted during appeals process
 - Includes information considered by the plan administrator
 - May also include minutes of the committee adjudicating the claim

What's Left for Trial? NOTHING!

◆ THIS IS THE TRIAL!

- Consider and respond to ALL arguments advanced by claimant
- Investigate all aspects of the claim and all relevant facts
- Ensure a complete administrative record
 - Include all required expert reports
 - Include all relevant witness statements
 - Include all relevant documents
- Be objective!
- Do not rubber stamp or cut-and-paste previous denials

Standard for Reviewing the Administrative Record

- ◆ “*Firestone*” language → plan confers discretionary authority on its administrator to determine eligibility for benefits or to construe the terms of the plan
 - Results in arbitrary and capricious standard of review (deferential)
 - Court may not substitute its own opinion or determination for that of the fiduciary
- ◆ No “*Firestone*” language → *de novo* standard of review (no deference)
 - In some jurisdictions, may also result in expansion of the administrative record

Effect of conflicts of interest or procedural violations

◆ Conflict of interest

- Limited discovery may be allowed into nature and extent of conflict
- Only considered a “factor” if conflict found to exist
- Does not heighten the standard of review

◆ Violation of ERISA or its claim regulations

- Example: failure to compile complete administrative record or consider all available evidence
- May change standard of review
- May also result in remand to plan administrator to properly consider certain evidence

Privilege Issues

- ◆ You should assume there is no attorney-client privilege during the administrative claims process!
 - “Fiduciary exception”: generally, “pre-decisional” communications (while claim is being adjudicated) are discoverable and not subject to the attorney-client privilege
 - Certain narrow exceptions apply
 - Example: where litigation is already pending and legal advice is rendered in connection with plan administrator’s litigation defense
 - Communications with counsel after a final benefit determination are more likely to be privileged

Standing Issues

- ◆ Participant and beneficiary standing
 - Have ERISA standing
 - Must also demonstrate Article III standing (injury in fact)
- ◆ Provider standing
 - No standing to bring direct claim under ERISA
 - May sue as assignee of participants/beneficiaries
 - **Scope of the written assignment matters!**
 - Anti-assignment provision in plan enforceable
 - Risk of waiver
 - Adverse impact on claims administration
 - **Consider limited anti-assignment provision**

Pleading Requirements for ERISA Claims

- ◆ Notice pleading
 - Historically, only general “notice” of claim required
 - All factual allegations assumed to be true for initial challenges to face of complaint
- ◆ “*Twombly*” and “*Iqbal*” requirements
 - Notice pleading not enough
 - Allegations must rise to the level of plausibility (not just “defendant harmed me” allegations or recitals of the basic elements of a cause of action)

Trials

- ◆ No jury trial
- ◆ Trial is to the Court on the administrative record
- ◆ Generally no “live” trial; Court generally tries the case on the written submissions of the parties

Statutes of Limitations

- ◆ ERISA requires claims for breach of fiduciary duty be brought before the EARLIER of:
 - 6 years after the date of the last action that constituted part of breach; or
 - 3 years after the earliest date the plaintiff obtained “actual knowledge” of the breach
- ◆ ERISA is silent with respect to other claims
 - Courts look to the most analogous state statute of limitation
 - Wide variation in limitations, depending on type of claim
 - Discrimination or retaliation claims – as short as 6 months
 - Breach of contract claims – as long as 20 years

Limitation Periods Imposed by Plan

- ◆ Plans can impose limitation periods shorter than those imposed by state law
 - Must be reasonable
 - Must be timely communicated to participants and beneficiaries

Class Actions

- ◆ ERISA class actions subject to same class action requirements as other types of claims
 - Rule 23 prerequisites must be satisfied
 - Generally involve an issue that applies uniformly to all or a group of participants/beneficiaries
- ◆ Examples:
 - Changes to retiree health
 - Fee and stock drop litigation
- ◆ Allows plan to resolve/settle claims in a single lawsuit without fear of multiple or future lawsuits

Examples of ERISA Claims Confronting Our Clients

Welfare Benefit Claims

- ◆ Eligibility
 - Effect of life events of which the plan has no knowledge
- ◆ Pre-existing condition
- ◆ Medical necessity
- ◆ Experimental
- ◆ UCR (the “usual, customary and reasonable” rate of reimbursement)
- ◆ Disability claims
- ◆ Severance claims
 - Reason for termination
 - Same chair rule

Retirement Benefit Claims

- ◆ Service counting
- ◆ Compensation calculations
- ◆ Coordination of benefits among successor plans
- ◆ Benefit conversions/transferring vested benefits to a different type of plan
- ◆ Identifying beneficiaries upon participant's death
 - Beneficiary designations
 - Plan default provisions

Misrepresentation Claims

- ◆ Fiduciary duty not to misrepresent the plan, plan eligibility or plan benefits
- ◆ Misrepresentations regarding eligibility for benefits
 - Eligibility for life or medical insurance
- ◆ Misrepresentations regarding the amount of benefit
 - Retirement plan estimates
- ◆ Disagreement – and importance – re “who is a fiduciary”
- ◆ *Amara* brings new life to these claims
 - Only applies to misrepresentation by a fiduciary
 - Claimant must typically show detrimental reliance

Stock Drop Cases

- ◆ Employees claim fiduciary violations for fiduciary's keeping employer stock in plan
 - ESOP safe harbor provisions
 - “*Moench*” presumption: No prudence violation if plan requires investment in employer stock
- ◆ Effect of federal securities laws
 - Prohibited by securities laws from acting on undisclosed material information
- ◆ **Keep benefit administration separate from company financial management**

Fee cases

- ◆ Class action lawsuits arguing fiduciary violations for not negotiating lower fees
- ◆ Generally dismissed at the very early stages
- ◆ Impact of new DOL fee disclosure regulations?

Subrogation

- ◆ Claims by ERISA plans for reimbursement of paid benefits, where participant/beneficiary has recovery against responsible third party
 - Impact of state anti-subrogation laws
 - What if the participant/beneficiary does not recover all damages?
 - Who pays the attorneys?
- ◆ **Plan must contain “magic language”**
 - No language: no relief for plan

Retiree Health Care Claims

- ◆ Welfare benefits not “vested”
 - Contractual vesting
 - Fiduciary claims based on representations
 - Effect of “reservation” clauses
- ◆ Non-union claims
- ◆ Union claims
- ◆ Usually class actions

Life Insurance Conversion Claims

- ◆ Typical scenario: former employee fails to convert group coverage to individual coverage within the deadline; dies soon thereafter
 - Effect of no notice
 - Who is responsible?

Severance

- ◆ Severance: Payroll practice? HR benefit? Or ERISA employee welfare benefit plan?
- ◆ Do we want ERISA?
 - Pros = ERISA preemption; exhaustion; standard of review
 - Cons = Compliance with reporting and disclosure requirements
- ◆ ERISA plan?
 - Does program require ongoing administrative scheme for processing claims and paying benefits?
 - Very factual inquiry made by Court, based on individual facts
 - Impact of discretion: the less discretion, the less likely to be found an ERISA plan
- ◆ Circumstances of termination

COBRA

- ◆ Notice penalties
 - Plan administrators can be assessed penalties of up to \$110/day for failure to provide initial notice or election notice
 - Generally only ERISA participants and beneficiaries may sue to recover statutory penalties
- ◆ Liability for failure to extend coverage
 - Benefit claims and breach of fiduciary duty claims
 - Remedies:
 - Damages for incurred medical expenses less COBRA premiums
 - Restore COBRA coverage as equitable relief
- ◆ Oftentimes uninsured!

Section 510 Claims

◆ Plant Closings

- Timing plant closing to maximize benefit savings
- **Avoid liability by effecting changes in your “settlor” role** (e.g., through plan amendment or, in union environment, through the collective bargaining process)

◆ Layoffs/limiting hours as a result of health care reform

- Liability under ERISA Section 510 for cutting hours or issuing layoffs to avoid offering health benefits required by health care reform??
 - Seeking to avoid penalties, not to interfere with ERISA rights
 - Exchanges are not employer plans

Multiemployer Plan Litigation: What is a Multiemployer Plan?

- ◆ Multiple employers participating in one plan
- ◆ One or more unions and collective bargaining agreements (“CBAs”)
- ◆ Sponsored and administered by joint board of trustees
- ◆ Types of plans
 - DB plans
 - Welfare plans
 - 401(k) plans
- ◆ Voluntary participation (e.g., CBA) or as a result of an acquisition, bankruptcy, etc.

Multiemployer Plan Litigation: Collection Actions

- ◆ Contribution Liability
 - Contributions
 - Interest
 - Liquidated damages
 - Mandatory attorneys' fees
- ◆ Audits
 - Required to provide audit data
 - Liability for audit costs

Multiemployer Plan Litigation: Withdrawal Liability

- ◆ Partial or total withdrawal
- ◆ Liable for pro-rata share of the fund's unfunded vested benefits ("UVBs") (*i.e.*, its underfunding)
- ◆ Rigid deadlines for disputing plan's assessment
- ◆ Very limited ability to dispute plan's assessment
- ◆ Responding to audit inquiries
- ◆ Ability to obtain relevant data

Multiemployer Plans in Financial Distress

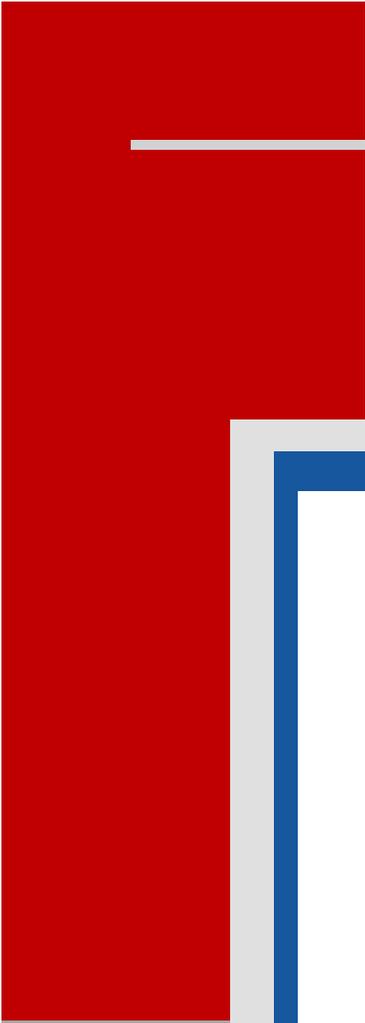
- ◆ What is distress?
 - Critical status (65%/red)
 - Endangered status (80%/yellow)
- ◆ What are consequences?
 - Unilateral contribution increases
 - Limitations on benefits (no increases, elimination of lump sum option, etc.)
 - Surcharges
 - Loss of benefits
- ◆ Conflicts between federal labor law and ERISA
 - What if benefit increases are required by CBA but prohibited by ERISA?

PBGC Litigation

- ◆ 4062(e) claims
- ◆ Involuntary plan terminations
- ◆ Distress plan terminations

ERISA Section 4062(e) Claims

- ◆ 4062(e) event:
 - Cease operations at a facility
 - Cessation results in termination of >20% of plan participants
- ◆ Statute imposes liability WITHOUT REGARD TO RISK to plan, participants or PBGC
 - PBGC announced pilot program in November 2012; generally will not enforce liability against “financially sound” or “creditworthy” companies
- ◆ Usually results in negotiated settlement
 - Collateral
 - Additional plan contributions



CONCLUSION: AVOIDING RANDALL, EMILY AND LORNA



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Avoiding and Preparing for ERISA Litigation

- ◆ Clear plan documents and clear delegations
- ◆ Buy all the options!
 - Fiduciary discretion
 - Limitation periods
 - Subrogation “magic language”
- ◆ Instruct HR and line personnel how to respond to inquiries; use disclaimers on communications
- ◆ Document your communications and decisions
- ◆ Behave like a fiduciary
 - Be pro-active
 - Be objective