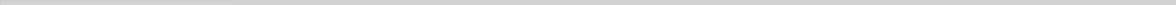
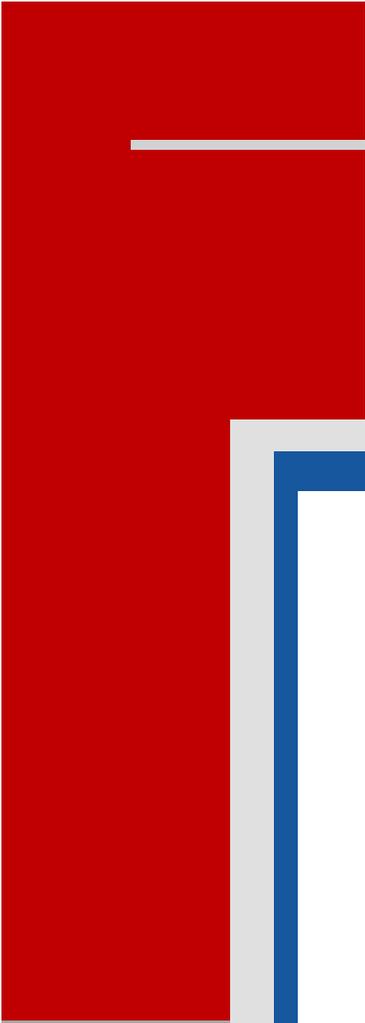




## The MC Academy

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)

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- ◆ 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)

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- ◆ 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)

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- ◆ 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?

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- ◆ 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

# 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