Proskauer

ERISA Newsletter

Third Quarter 2018

Editor's Overview

In last quarter's Newsletter, we commented that all eyes were on President Trump's nomination to the U.S. Supreme Court, as the outcome of the appointment process can have a significant impact on the course of ERISA litigation, as well as many related areas of practice. Well, here we are headed into the fall and all eyes continue to be focused on President Trump's nominee and the FBI investigation that is underway to see what it will discover about the nominee. While observing these global developments, we also continue to consider developments with respect to the more enduring features of our day-to-day practice. We take this opportunity to discuss electronic discovery as applied to the litigation of employee benefit disputes. This issue may not be as interesting to some as the FBI investigation currently underway, but, as discussed below, plan sponsors and fiduciaries are well advised to understand the importance it may play in litigation.

The balance of our Newsletter discusses recent case law developments involving fee litigation, 403(b) plans, company stock funds, preemption, standing, and attorneys' fees.

E-Discovery in ERISA Litigation

By Lindsey Chopin

The days of sifting through and producing boxes of documents in response to litigation discovery are—for the most part—long gone. Instead, litigation counsel is more typically preoccupied with the production of electronically stored information, commonly referred to as ESI. The trend toward ESI discovery is certainly being experienced in connection with litigation involving employee benefit plans. Given the sheer size of many employee benefit plans, the large number of participants and beneficiaries (both actives and retirees) in those plans, and the extensive reporting and disclosure requirements mandated by the Employee Retirement Income Security Act of 1974 (ERISA), it stands to reason that e-discovery in ERISA litigation can be a massive undertaking. And while modern technology helps litigants navigate through the process, there may be difficult strategic choices to make, and risks to confront, along the way. In this article, we highlight some considerations relevant to e-discovery as applied to the litigation of employee benefit disputes.

1. Consider Whether The Requested ESI Is Proportional To The Needs of the Case

Despite its prevalence in litigation, discovery of ESI may not be appropriate in all matters. Rule 26(b)(1) of the Federal Rules of Civil Procedure permits a party to:

obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit . . . .

The collection, review and production of ESI—no matter how small or large the volume of documents—takes time, money and resources, and large productions can quickly become unduly burdensome and costly. Thus, consideration should be given in all cases as to whether the discovery of ESI is proportional to the needs of the case. This is true especially in complex litigations over employee benefits where the volume of documents sought and produced from the plans far exceeds that produced by participants and beneficiaries. In the absence of negotiating effective limitations on the scope of ESI discovery, it is good practice to document the burdens and costs associated with collecting, processing, and producing the ESI. It may help a court resolve a dispute about whether the requested discovery is in fact proportional, or whether to impose cost-sharing, as contemplated by the advisory comments Federal Rule of Civil Procedure 26(c)(1)(B).

2. Consider the Implications of Self-Collection and Production

In litigation involving employee benefit plans, many of the relevant materials—e.g., plan documents, summary plan descriptions (SPDs), and participant communications—are often readily accessible and their contents are well-known. Although a quick collection and production of these materials via encrypted email may seem harmless, consideration should be given to whether the search for responsive documents has included all appropriate custodial (i.e., people) and non-custodial (e.g., shared drives) sources. The same of course would be true for documents that are less readily accessible.

Consideration also should be given to whether there is a need to preserve metadata. Metadata is data about the data that is being produced, such as the file name, date modified, recipient, etc. The failure to preserve metadata may be viewed as spoliation, which could lead to court-imposed sanctions. For example, a court in one case chastised and sanctioned a producing party, stating that their "amateurish collection of documents leading to the destruction of perhaps critical metadata certainly reflects that plaintiff did not take 'reasonable steps' to preserve the evidence as required by Rule 37(e)." Leidig v. Buzzfeed, Inc., 16-cv-542, 2017 WL 6512353, at *12–13 (S.D.N.Y. Dec. 19, 2017).

3. Consider Whether Forensic Data Is Responsive

Many litigators are familiar with discovery of active, electronic documents stored on electronic devices and processed in the applications people use every day, such as e-mail, word processing, shared folders, etc. They may be less familiar, however, with forensic data, which is digital data that exists on a level that is not readily accessible by a lay person, such as the history of activity on a device, click-paths for websites, archived information on back-up tapes, and deleted data and files.

As companies migrate to paperless or semi-paperless operations, analysis and/or discovery of forensic data has the potential to become more relevant. For instance, if a litigant sought to determine whether a mistake was made in completing a benefit enrollment form, she might typically seek draft or discarded copies of the enrollment form, if the enrollment records are kept in hard copy. If an online enrollment system is used, additional information may be stored digitally, such as information on when the online system was accessed, how long the employee was on the page, what she clicked on, etc. Similarly, if an SPD is posted on an intranet page rather than mailed in hard copy, there may be forensic data showing the views of the SPD, and that may be useful for purposes of establishing whether and when a participant had actual knowledge of plan terms.

4. Cautiously Embrace New Technology

Given the ever-increasing volume of ESI, document-by-document, manual review of potentially responsive documents is becoming less and less practical. New technologies may present the means for tackling discovery more efficiently. For example, technology-assisted review (TAR) software allows attorneys to use sample sets of responsive and non-responsive documents to train a computer program to conduct an automated document review. Over the past several years, TAR has gained popularity as a tool to standardize review and combat the resource demands of a large-scale document review. TAR is not fool-proof, however, and gives rise to an entirely new set of issues, such as whether the reviewing party properly "trained" the review system, how to validate and audit the results of the review, and whether using TAR is even proper at all. See, e.g., Entrata, Inc. v. Yardi Sys., Inc., 15-cv-102, 2018 WL 3055755, at *3 (D. Utah June 20, 2018). Due to the learning curve and new issues associated with TAR and other new technology, litigation counsel are well-advised to learning about these issues before they arise in litigation.

Proskauer's Perspective

As litigation over employee benefits increases in complexity, and the technology used to store, access, process, and produce such information continues to evolve, an effective discovery plan should devote considerable attention to issues pertaining to the discovery of ESI. Indeed, Rule 26(f)(3)(C) of the Federal Rules of Civil Procedure requires the parties to discuss ESI during their initial planning conference. The issues may seem daunting to some, but there is no expectation of perfection in responding to discovery; rather the federal rules require reasonable and proportional responses. Thus, best practices militate in favor of staying abreast of new advances so that when litigation arises reasonable and informed decisions on how to handle e-discovery can be made.

Highlights from the Employee Benefits & Executive Compensation Blog

DOL Fiduciary Rule

As DOL Fiduciary Rule is Officially Vacated, Focus Shifts to SEC

By Seth Safra and Russell Hirschhorn

After nearly a decade in the making, the Department of Labor's fiduciary rule appears to be officially dead. On June 21st, the U.S. Court of Appeals for the Fifth Circuit issued its mandate that finalized its earlier decision vacating the rule—discussed here. Along with the regulation that expanded the definition of investment fiduciary, the mandate wipes out the Best Interest Contract and Principal Transaction exemptions. Recognizing that many fiduciaries have invested significant compliance resources in reliance on those exemptions, however, the Department of Labor has issued a "no enforcement" policy that continues prohibited transaction relief as if those exemptions were still available. The "no enforcement" policy applies for fiduciaries who "are working diligently and in good faith to comply with the [exemptions'] impartial conduct standards." It is discussed here and will remain in effect until DOL issues new guidance. Meanwhile, the SEC published proposed conflict of interest rules for broker-dealers and investment advisers. The comment period for the SEC's proposal runs to August 7, 2018—discussed here.

Fee Litigation

Record-Keeper Defeats Second Round of Robo-Adviser Fee Litigation

By Lindsey Chopin

As we reported here, record-keepers for large 401(k) plans have thus far been successful in defending ERISA fiduciary-breach litigation over investment advice powered by Financial Engines. These lawsuits generally claim that fees collected by record-keepers for investment advice were unreasonably high because the fees exceeded the amount actually paid to Financial Engines. Plaintiffs in Chendes v. Xerox HR Solutions, LLC were given a second chance to plead their claims, this time alleging that the defendant record-keeper was a fiduciary because it "used its influence" as the plan's record-keeper to force the plan sponsor to engage Financial Engines—primarily by refusing to use any other investment adviser—and therefore exercised de facto control over the plan's retention of Financial Engines. The court rejected the argument that constraining the plan's service provider choices amounted to de facto control since the plan had other alternatives to choose from (such as not using an investment adviser or changing record-keepers) and dismissed the claim without leave to amend, ending the case at the district court. The case is Chendes v. Xerox HR Solutions, LLC., Case No. 2:16-cv-1398, ECF No. 63 (E.D. Mich., June 25, 2018).

403(b) Plans

Ninth Circuit Rejects Bid To Arbitrate ERISA Plans' Claims

By Russell Hirschhorn

The Ninth Circuit held that employees' agreements to arbitrate all claims the employees may have did not extend to claims brought on behalf of two ERISA plans under ERISA § 502(a)(2). In so ruling, the Court explained that the employees could not agree to arbitrate claims on behalf of the plans in individual employment contracts because those employees cannot waive the plans' rights. The Court also rejected an argument that the employees were, as a practical matter, seeking individual relief for their own plan accounts because relief flows to the plans as a whole from a winning fiduciary breach claim, even when the plan is a defined contribution plan. The case is Munro v. Univ. of S. California, No. 17-55550, 2018 WL 3542996 (9th Cir. July 24, 2018).

Employer Stock Fund Litigation

Fifth Circuit Affirms Dismissal of ERISA Stock Drop Action

By Joseph Clark

The Fifth Circuit agreed that a participant in Idearc's 401(k) plan failed to plausibly plead that the plan fiduciary's failure to act on publicly available information about Idearc amounted to a breach of fiduciary duty in connection with making Idearc stock available as an investment option in the plan. The decision was guided by an earlier Supreme Court decision in which the Court ruled that allegations that a fiduciary should have recognized from publicly available information alone that the market was overvaluing or undervaluing the stock are implausible as a general rule, at least in the absence of "special circumstances." The Fifth Circuit first rejected the participant's argument that where, as here, an imprudence claim was based on publicly available information, he need not prove "special circumstances" if the underlying allegations are that the stock was too risky as opposed to artificially inflated. The Fifth Circuit also disagreed with the participant's assertion that defendants' alleged fraud constituted a "special circumstance," because the alleged fraud was "by definition not public information" and the participant did not allege how the alleged fraud would affect the stock's market price in light of all public information. Second, the Fifth Circuit concluded that, even if defendants acted imprudently by failing to consider alternatives to continuing to invest in Idearc stock, Kopp failed to allege facts supporting the conclusion that defendants would have acted differently had they engaged in proper monitoring of the stock, and that an alternative course of action could have prevented the plan's losses. Lastly, the Fifth Circuit declined to infer that defendants acted with inappropriate motivations by maintaining the stock fund as an investment option because they stood to gain financially from Idearc's success. In so ruling, the Court found that a potential conflict does not equate to a plausible disloyalty claim, and that Kopp's allegations at most showed that defendants acted to protect the value of Idearc stock, which was consistent with protecting the plan. The case is Kopp v. Klein, 2018 WL 3149151 (5th Cir. June 27, 2018).

Preemption

ERISA Doesn't Preempt Nevada Law Limiting General Contractors' Obligations To Pay Delinquent Contributions

By Benjamin Flaxenburg

The Ninth Circuit recently held that ERISA does not preempt a Nevada state law that curtailed the ability of multiemployer plans to recover unpaid employer contributions. Under Nevada law SB 223, general contractors can be held vicariously liable for the labor debts of their subcontractors, including contributions owed by subcontractors pursuant to a collective bargaining agreement, provided that they receive certain notices. The state law also provides for a one-year statute of limitations. The Ninth Circuit explained that SB 223 was enacted because general contractors too often found themselves liable for the unpaid labor debts of their subcontractors.

The case reached the Ninth Circuit following entry of a declaratory judgment by the district court in favor of a multiemployer plan, finding that SB 223 was preempted by ERISA's comprehensive regulatory framework. The Ninth Circuit reversed and explained that ERISA only provides a cause of action for delinquent contributions against the delinquent contributing employer, and that the right to recover unpaid contributions from general contractors was a result of Nevada's vicarious liability law. Therefore, SB 223 trimmed only rights available under state law and not those guaranteed by ERISA. Additionally, the Ninth Circuit observed that SB 223 applied equally to any individual or entity seeking to recover labor debts from a general contractor, which foreclosed the argument that the law impermissibly targeted ERISA plans. The case is Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers, No. 16-cv-15588, 2018 WL 4200961 (9th Cir. Sept. 4, 2018).

Standing

Sixth Circuit Holds Pecuniary Loss Not Required to Establish Standing In Benefit Claim

By Benjamin Flaxenburg

The Sixth Circuit joined several other circuits in holding that a participant need not have actually incurred a financial loss in order to have standing to assert an ERISA claim for benefits under Section 502(a)(1)(B). Here, the plan participant arranged an air ambulance for his son in a non-emergent situation, but the plan refused to pay the bill on the ground that the service had not been pre-certified. The Court explained that even though the ambulance service had not directly billed the plan participant, the participant's allegation that the plan breached its promise to pay all medical transportation expenses constituted an injury-in-fact sufficient to confer standing. The case is Springer v. Cleveland Clinic Employee Health Plan Total Care, No. 17-cv-4181, 2018 WL 3849376 (6th Cir. Aug. 14, 2018).

Attorneys' Fees

Second Circuit Requires Reevaluation of ERISA Attorney Fee Judgment

By Benjamin Flaxenburg

The Second Circuit determined that a district court erred when it denied an attorney fee award to an ERISA plaintiff who had sought benefits from a plan. In so ruling, the Second Circuit first concluded the district court incorrectly determined that the plaintiff had not achieved "some success"—a threshold requirement for an ERISA fee award—because "some success" was achieved by getting the district court to vacate its earlier decision based on an intervening Second Circuit decision. The underlying issue pertained to the appropriate standard of review where a plan allegedly did not have claims procedures that complied with the DOL regulations. The Second Circuit next determined that the district court's ruling failed to adequately apply the five-factor test used to determine the propriety of a fee award. Those factors include: (1) the offending party's culpability or bad faith, (2) the offending party's ability to satisfy an award, (3) whether an award would deter similarly conduct, (4) the merits of the parties' positions, and (5) whether the action conferred a common benefit on other participants. The Second Circuit explained that the district court relied too heavily on its conclusion that defendants demonstrated no bad faith, neglected to consider plaintiff's success on the merits, and failed to assess the extent of defendants' culpability or their ability to pay an award. The Second Circuit thus vacated the district court's decision and remanded for further consideration. The case is Tedesco v. I.B.E.W. Local 1249 Ins. Fund, No. 17-cv-3404, 2018 WL 3323640 (2d Cir. July 6, 2018).

- **Russell L. Hirschhorn**
  Partner
- **Myron D. Rumeld**
  Partner