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View From Sidley: Steps for Employers to Consider to Mitigate ERISA Litigation Risk

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The past two decades have seen a rise in Employee Retirement Income Security Act lawsuits against employers and plan fiduciaries, as the plaintiffs' bar has become more sophisticated and recognized that certain types of ERISA claims are well suited for class certification. Given the Supreme Court's landmark decision in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 50 EBC 2569 (U.S. 2011), which held that ERISA permits a broad range of equitable remedies, the expanded pool of potential plaintiffs as the baby boomer generation enters retirement age, and the numerous legal pitfalls associated with designing and implementing large and complex employee benefit plans, ERISA lawsuits will continue to be a fact of life for plan sponsors and administrators. This article explores some proactive steps that employers can consider to help mitigate ERISA litigation risk.

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Language Providing Discretion to Interpret the Plan

Deferential review of a plan administrator's decision on a claim for benefit is a cornerstone of ERISA. Under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 10 EBC 1873 (1989), if a plan grants the plan administrator or fiduciary discretion to interpret the plan, a court is required to uphold the administrator or fiduciary's decision as long as it is reasonable, even if the court would have arrived at a different conclusion on its own. Deferential review is a principle rooted in trust law and promotes uniformity and predictability in plan administration, which in turn promotes ERISA's goal of encouraging employers to offer benefit plans.

The importance of this principle cannot be overstated. Like any complex contract, an ERISA plan is likely to contain provisions that are subject to multiple interpretations. If a participant convinces a court that an ambiguous provision should be interpreted in a manner that is inconsistent with how the administrator has historically interpreted and administered the plan, the results could be disastrous for the plan and the employer. Deferential review greatly decreases this risk by increasing the chances that the plan administrator's interpretation will be upheld.

While most practitioners are aware of the deferential standard of review, many forget that it is not the default rule under ERISA. The default rule is that a plan administrator's decision will be reviewed under a non-deferential, or *de novo*, standard of review. The deferential abuse of discretion standard applies only if the plan ''gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.'' *Firestone*, 489 U.S. at 115.

Employers should keep in mind that deferential review has recently come under attack by state legislatures and insurance regulators. Many states now ban or restrict discretionary clauses in insurance contracts in an effort to force federal courts to review benefit determinations under the *de novo* standard. (For a more detailed discussion, please see 85 PBD, 5/4/15). These restrictions, however, should not apply to non-insurance plans such as defined benefit and defined contribution plans and self-insured welfare plans.

Employers should check their plan documents and summary plan descriptions, and consult with legal counsel, to ensure that the plan grants the administrator and fiduciaries the appropriate discretionary authority.

Contractual Statute of Limitations

ERISA sets forth a six-year statute of repose for fiduciary claims, which is shortened to a three-year period in cases where the participant has actual knowledge of the alleged breach. However, ERISA does not specify a limitations or repose period for non-fiduciary claims, such as a claim for benefits under the terms of the plan. For non-fiduciary claims, courts borrow the state law limitations period applicable to the most analogous state law claim.

This approach leads to inconsistency and unpredictability. Some courts borrow the limitations period from the state where the participant decided to sue, while others borrow from the state with the most significant relationship to the dispute. For plans with participants who reside in several states, it may be impossible to predict which state's limitations law will apply.

Even if it is clear which state the federal court will borrow from, the most analogous state law cause of action will vary depending on how the plaintiff chooses to frame his or her pleading. In many cases, courts analogize claims for benefits to breach of contract claims. But depending on the nature of the plaintiff's claim, a more analogous state law claim might be a tort claim, a claim for wrongful termination, or a claim for liability based on a statute.

In addition, state law limitations periods can be quite lengthy. For example, Illinois has a ten-year statute of limitations for written contract claims. The more time that passes before a participant sues, the more difficult and expensive it is to litigate a case, as relevant witnesses may be difficult to track down or deceased, memories have faded, and documents may be gone or difficult to locate.

The upshot is that, without a single, uniform limitation period, claims involving the same plan may be subject to a crazy-quilt of different statutes of limitations, which undermines ERISA's goal of predictability and uniformity in administration of benefit plans. Shorter limitation periods can also cut off liability at an early proceedings where it is clear from the complaint that the claims are time-barred.

A solution is to specify a reasonable limitation period in the plan document. In *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 57 EBC 1265 (2013), the Supreme Court held that ''[a]bsent a controlling statute to the contrary, a participant and a plan may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as the period is reasonable.''

Heimeshoff upheld a contractual limitation of three years. Whether a shorter limitations period would be deemed reasonable may depend on the jurisdiction and the facts and circumstances. Employers also should be mindful that courts may refuse to enforce a contractual limitations period if it is not disclosed to participants. *See, e.g., Mirza v. Insurance Administrators of America, Inc.*, No. 13-3535, 2015 BL 274984 (3d Cir. Aug. 26, 2015). Accordingly, any contractual limitations period should be disclosed in the relevant summary plan description, as well as claim denial letters.

On a related issue, employers should also consider adding ''anti-tolling'' language to the plan document. Participants have had some success in arguing that the filing of an administrative claim for benefits tolls the statute of limitations for fiduciary claims. This argument should be foreclosed by *Heimeshoff*, where the Supreme Court held that a plan's contractual limitations period was not tolled while the participant exhausted administrative remedies. While this aspect of *Heimeshoff* should apply with equal force to attempts to toll the statute of limitations for fiduciary claims, *Heimeshoff* is a relatively new opinion, and there may be little downside in adding an explicit statement to the plan document that the fiduciary statute of limitations and repose are not tolled by the filing of an administrative claim.

Forum Selection Clauses

ERISA Section 502(e)(2) provides that participants may bring lawsuits in a district where the plan is administered, where the alleged breach took place, or where a defendant resides or may be found. This broad jurisdictional provision, combined with the fact that a plan's participants are often spread across the country, means that sponsors often find themselves defending against claims in a variety of far-flung locales, many of which have adopted conflicting interpretations of ERISA. A plan provision that is lawful in one circuit may be illegal in another; a lawsuit that would be unquestionably time-barred if it were filed in federal court in Florida might be timely if it were filed in California. Accordingly, forum shopping by enterprising plaintiffs' attorneys is common in ERISA litigation.

Sponsors can reduce this risk by adding forum selection clauses to their plans. These clauses serve two important purposes. First, they promote ERISA's goal of predictability and uniformity in benefit administration by removing the prospect of being subject to conflicting law. Second, specifying a venue where the plan is administered can reduce or eliminate the burden and expense associated with company witnesses traveling across the country to defend against an ERISA lawsuit.

Although the DOL has argued against forum selection clauses in amicus briefs and a few courts have invalidated such clauses, most courts uphold them. Although the Supreme Court has not addressed the validity of forum selection clauses in ERISA plans, it has held that a forum selection clause should be enforced under federal law, unless a plaintiff can show that it is unreasonable. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

There are circumstances where designation of a ''home'' forum might not be in the employer's or plan's interest. The ''home'' forum might offer administrative convenience, but if it is located in a circuit that has adopted a minority view on an ERISA issue that is harmful to the sponsor's interests, the benefit of administrative convenience might be offset by subjecting all of the plan's cases to harmful legal precedent. In that case, the employer may want to consider alternative jurisdictions.

Releases & Arbitration

Employers often enter into release agreements with employees in connection with a reduction in force or an individualized severance agreement. Typically, in exchange for severance payments or other benefits, the employee agrees to release the employer from claims related to his or her employment, such as employment discrimination claims. However, employers often neglect to draft the releases to cover ERISA claims.

Courts have disagreed over the validity of releases of ERISA claims, and the validity of a release may depend on whether the claim is for benefits under the plan terms, for fiduciary breach, or a claim brought derivatively on behalf of the plan. *See, e.g., In re Schering Plough Corp. ERISA Litigation*, 589 F.3d 585, 48 EBC 1385 (3d Cir. 2009) (holding that ERISA does not prohibit releases of claims for fiduciary breach, but release did not bar derivative claim brought on behalf of plan); *Bacon v. Steifel Labs Inc.*, 51 EBC 2801 (S.D. Fla. Oct. 17, 2011) (enforcing release of ERISA claims for breach of fiduciary duty).

Employers should also consider including mandatory arbitration provisions in release agreements or employment applications. Most courts have enforced arbitration agreements in the ERISA context. *See Hornsby v. Macon Greyhound Park, Inc.*, 2013 BL 111231 (M.D. Ala. 2012) (agreeing with majority rule that ERISA claims may be subject to arbitration); *but see Amaro v. Cont'l Can Co.*, 724 F.2d 747, 5 EBC 1215 (9th Cir. 1984) (holding that the resolution of ERISA issues ''is a primary responsibility of courts, not arbitrators'').

There are many obvious advantages of arbitration from the employer's perspective. Arbitration is typically less expensive and faster than litigation. It usually involves more streamlined and limited discovery, is conducted in private, and scheduling tends to be more flexible.

However, there are potential downsides. A district judge's decision is subject to appellate review, but it is exceedingly difficult to overturn an arbitrator's award. In addition, some practitioners believe that arbitrators are less likely to grant motions to dismiss filed by the defendant, whereas a judge may be more willing to dismiss a complaint that is deficient on its face.

It is impossible to eliminate ERISA litigation risk, but employers who carefully consider these proactive measures can reduce their potential exposure. Employers should consult legal counsel and carefully consider whether these steps make sense from both a legal and business perspective.