NEW RULES, NEW REGULATIONS, NEW LITIGATION

AN UPDATE ON EMPLOYMENT PRACTICES AND FIDUCIARY LIABILITY EXPOSURES

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FIDUCIARY LIABILITY EXPOSURES
Fee Litigation – New Cases, New Players

- Extraordinary media attention focusing on fees and expenses in 401(k) plans
  - Jerry Schlichter started bringing these suits in December of 2007.
    - Challenged to revenue sharing
    - Retail class funds vs. institutional funds
    - Fiduciaries of large plans should leverage concessions
  - Early losses, but some sizeable settlements
  - DOL implemented heightened disclosure requirements
– The Second Wave has brought new players into the game,
  • Minneapolis-based Nichols Kaster
  • Bailey & Glasser
  • Robbins Arroyo

– Deluge of suits in last fifteen months.

– Investment performance claims
  • Net of fees, 80% of funds underperform their benchmarks
  • Plaintiffs allege underperformance versus benchmark over period of time
  • Performance measured versus low-cost, passively managed fund
• Fee litigation with a twist
  – Similar, lower cost options were available from other providers
  – Decisions were motivated by self-interest
  – Duty of loyalty claims
  – Business and reputational risks
    • These products are offered to 3rd parties
## Fee Litigation

**Post - *Tibble v. Edison Int’l*, (U.S. May 18, 2015)**

### Suits Against Sponsor
- Allianz
- American Airlines (Main v. American Airlines, ND Texas 4/15/16)
- American Century
- Anthem, Inc.
- BB&T
- Checksmart ($25M plan)
- Chevron Corp.
- CVS
- Deutsche Bank Americas
- Edward Jones
- Franklin Templeton
- Fujitsu
- Insperity
- Intel
- LaMettry ($9M plan, suit withdrawn)
- M&T Bank
- Morgan Stanley
- Neuberger Berman
- New York Life Insurance Co. (settled similar suit in 2008 for $14M, relating to Mainstay funds)
- Oracle
- PIMCO
- Verizon Communications (Jacobs v. Verizon filed 2/11/16)

### Suits Against Provider
- Reliance Trust
- Fidelity Management Trust Co.
- Massachusetts Mutual
- Prudential
403(b) Plans in the Crosshairs

- Columbia University
- Cornell University
- Duke
- Emory
- Johns Hopkins
- MIT
- NYU
- Northwestern
- University of Pennsylvania
- University of Southern California
- Vanderbilt University
- Yale
• Decided by the Supreme Court 6/25/2014
• Eliminated presumption of prudence
• Set high pleading standard:
  – Steps that fiduciaries could have taken
  – Not more harm than good to plan
• DOL and SEC file coordinated amicus briefs in BP
• New stock drop litigation:
  – Arch Coal
  – Avon – Filed 12/15. Settled for 6.25M
  – First Citizens Bankshares
  – Target Corp.
• The Walt Disney Company – Sequoia Fund
• Fidelity Float Income
  – HP
  – United Airlines
Medical Plan Claims

• “Standing” claims
  – Assignment of benefits
  – “In-network” vs “out of network” payments

• Mental health parity
• Capacity – Tons of it
• Pricing – See Capacity
  ➢ -5% to 0%
  ➢ 0% to 5% Employee Stock Ownership Plans (ESOPs)
• Coverage
  - Underwriters willing to offer enhancements
  - Settlor coverage
  - Sub-limits, Health Insurance Portability and Accountability Act (HIPAA), Voluntary Settlement Program, penalties

• Concerns – Excessive Fee Litigation
THE TOP ISSUES THAT ARE DRIVING EPL LITIGATION AND EXPOSURE
What is Driving EPL Litigation?

- New and increased exposures and an activist government
- Plaintiff’s lawyers
- “Everyone” knows, or thinks they know, their (purported) rights (blame the Internet)

Mid-size corporations surveyed report that EPL cases represents 50% of active litigation

- Increased litigation costs, including e-discovery
- Increased settlement value
### WAGE HOUR LITIGATION

- **8954** Federal wage hour complaints filed in 2015-continues to increase
- **$463.6M** Monetary value of top 10 settlements in 2015
- **1.6 B** Back wages recovered by DOL since 2009
- **246M** Back wages recovered by the DOL in 2015
- **10%** Increase in DOL Agency investigations in 2015

- California, New York, Florida and Texas remain hotspots.
- Hospitality, finance, retail and manufacturing continue to be prime targets.
• U.S. DOL’s final rule raises $455/week minimum salary for exempt employees to $913 on Dec. 1, 2016--or in terms of annual salary, from $23,660 annually to $47,476.

• This means that any exempt employee making less than $47,476 loses his or her exemption, period.

• Expectation: Even more litigation
JOINT EMPLOYMENT: THE QUEST TO EXPAND THE DEFINITION OF “EMPLOYER”
• **Old test:** Control must be “direct and immediate” (i.e. hiring, firing, supervision, and direction).

• The *Browning-Ferris* “new test”--Control can be **direct**, **indirect** or even a reserved right to control, whether or not that right is ever excised.

• Business models impacted by new standard:
  – Franchisors / Franchisees: *The McDonald’s Case!*
  – User / Supplier; Parent / Subsidiary; Contractor / Subcontractor; Temporary Staffing Services
The DOL’s Attack on the Fissured Workplace: January 2016 Administrative Interpretation

• Protect workers in “fissured workplaces” where more than one business is involved in work being performed with stated goal to chase the deeper pockets.

• January 2016 AI makes specific mention of the following industries:
  • Construction; agriculture; janitorial; warehouse and logistics; staffing and hospitality

• Potential costs:
  – Increased litigation—AI signal to Plaintiff’s lawyers to be expansive
  – Wage and overtime liability.
  – Liquidated damages.
  – Worker’s attorneys’ fees.
Managing The Risk

• Consider relationships with:
  – Staffing companies, franchisees, parents and subs, “sister” companies, etc.

• Review “quality” of business partners

• Analyze risk/reward of “shoring up” joint employment factors or changing nature of relationship

• Determine whether risks addressable through indemnification or other avenues
Misclassification of Independent Contractors

- DOL issued AI in July 2015: most contractor relationships are really employment relationships
- Multiple large scale class action litigation:
  - Uber ($100M settlement rejected), Lyft, GrubHub, Fed Ex ($228M settlement)
- Many states are passing laws creating a “presumptive employee status”
  - placing burden on employers to overcome presumption that workers are independent.
  - 27 states have some version of such laws, including California, Florida, Illinois, New Jersey and Wisconsin.
INCREASED AGENCY ACTIVISM
EEOC Trends In 2016

• Continued focus on systemic investigations
• Continued scrutiny of hiring policies and practices, such as criminal background checks and credit checks
• Expansion of pregnancy and religious discrimination claims, in particular with regard to reasonable accommodations issues
• Broad interpretation of LGBT rights in the workplace
  – EEOC views discrimination based on sexual orientation as an allegation of sex discrimination under Title VII.
  – EEOC’s strategic plan for 2013-2016 considers coverage of LGBT issues under Title VII to be a national priority.
• Ongoing scrutiny of ADA claims
  – Of the 142 lawsuits filed by the EEOC in FY 2015, the largest number (37% or 53 lawsuits) involved ADA claims.

• Increased attention to equal pay

• Increased focus on investigations in the absence of charges of discrimination

• Workplace harassment
  – EEOC has set up a special task force to address the ongoing concerns of harassment in the workplace.
Under Section 7 of the NLRA, employees may engage in “concerted activities for …other mutual aid or protection.”

– Applies equally to unionized and union-free workplaces.

– Applies in the workplace and on-line.

NLRB attempting to enforce Section 7 rights in a multitude of settings
NLRB: Protected Concerted Activity

- Social Media
- Employee Handbooks
- Prohibitions against class or collective proceedings (i.e., class action waivers) violate an employee’s right to engage in protected concerted activity
  - Split in Circuits:
    - 2nd, 5th, 8th Circuits – class and collective waivers do not violate NLRA
    - 7th, 9th Circuits – agree with NLRB
    - Supreme Court petitioned and review is expected
THE INCREASED FOCUS ON “EQUAL PAY”
PLUS The Three “Big Ps” of Pay Equity
• **Pope Francis:** “Why is it taken for granted that women must earn less than men? No! *The discrepancy is a pure scandal.*”

• **President Obama:** “*Women deserve equal pay. It’s 2016. It’s time.*”

• **Patricia Arquette:** “It’s our time to have *wage equality once and for all.*”
Pressure on Employers to Achieve and Announce “Pay Equality”

• Pressure from activist investors to achieve pay equality and transparency

• IT Sector and other Fortune 500 companies feel increasing pressure to conduct pay equity analyses

• … and *publish* the results
  
  – “I'm proud to share that at Facebook, men and women earn the same”
    - Lori Matloff Goler, *Facebook, Inc.*

  – Black employees earn $1.003; Hispanic employees earn 99.9 cents; and Asian employees earn $1.006 for every $1 earned by White employees
    - Kathleen Hogan, *Microsoft Corp.*
EEOC Focus on Equal Pay

- Focus of EEOC Strategic Enforcement Plan
- Reasonable cause findings 11X greater for systemic pay
  - In FY 2014, EEOC found reasonable cause in 33% of Equal Pay Act systemic charges.
  - In comparison, 3% across all is charges received by EEOC
- EEOC filing systemic pay discrimination lawsuits
  - EEOC recently filed suit against NYC for pay discrimination and seeks $247 million in damages
EEOC Proposal to Collect Pay Data

• Adds “W-2 earnings” and work hours for all employees to EEO-1 reports starting in 2017
  – Reported by race and gender in 12 pay bands in 10 EEO-1 categories
  – Reporting burden will increase by 1,933%

• EEOC and OFCCP will use pay data for targeted systemic pay investigations

• EEOC will publish pay data by industry and geography for employers to “benchmark” against
  – Who else can use the pay data? Unions, plaintiffs’ counsel, competitors, the press . . .
Wave of Aggressive Pay Laws with California Leading The Way and 20+ States Following

- California Fair Pay Act:
  - Compares “substantially similar” employees, when viewed as a composite of skill, effort, and responsibility; across locations;
  - Employers must explain the “entire wage differential;”

- New York Equal Pay Act:
  - For first time, “disparate impact” recognized for pay claims.
  - So, no intent required to prove pay bias, just the disparities.

- Massachusetts Pay Equity Bill (Proposed):
  - Illegal to ask job applicants for prior salary.
  - Affirmative defense of good faith “self-evaluation” of pay in the past three years.
• Review personnel policies for compliance
• Conduct EEO training for managers
• Conduct a vulnerability audit (privileged if possible)
  – Wage hour
  – Pay disparity
  – Potential joint employment exposure
• EPL insurance and use of insurers’ risk management products
Employment Practices Liability Insurance (EPLI) Market

• Capacity
  ➢ Allianz, Berkshire, Argo
  ➢ 1991 – 5 carriers writing EPL
    2016 – 50+ carriers

• Pricing
  ➢ -2.5% to +2.5% (Non-problematic risks)
  ➢ 0% to +10% (California, large financial institutions)
  ➢ Pricing Factor = retentions
Employment Practices Liability Insurance (EPLI) Market

- Coverage
  - Counsel – claims handling
  - Joint employer liability
  - Fair Labor Standards Act (FLSA)
    - Standalone
    - Sub-limited defense
  - Evolving and changing legal landscape
    - Interns
    - Genetic Information Nondiscrimination Act of 2008 (GINA)
    - Felons
  - Late Notice
EPLI Market

• Concerns
  ➢ Active government involvement (NLRB, EEOC)
  ➢ FLSA Activity
  ➢ California
  ➢ General Claim Trends
    • ↑ Activity
    • Expense issue
    • 100K everywhere