Group Legal Services Association

Solo, Small Firm, and General Practice Section

2016 Joint Spring Meeting

May 11-14, 2016, Key West, Florida

ERISA Update: Recent Legal Decisions in Employee Benefits, Labor and Employment Law

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Thursday, May 12

9:45 am – 10:45 am
11:00 am – 12:00 pm
Salon A-2

Presenter: Katherine Hesse, Murphy Hesse Toomey & Lehane, LLP, Quincy, MA

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About the Presenter

Katherine A. Hesse is a founding partner of Murphy, Hesse, Toomey & Lehane, LLP, a multi-service law firm with offices in Quincy, Boston, and Springfield, Massachusetts.

Ms. Hesse practices primarily in labor and employment and employee benefits law. She serves as counsel to business, government, and not-for-profit

entities including hospitals, colleges and single and multi-employer private and public retirement and welfare plans. She counsels clients on a daily basis on employment and benefits issues and has litigated numerous employment and benefits cases before the state and federal trial and appellate courts, administrative agencies and arbitrators. Ms. Hesse is also an active practitioner in a variety of forms of alternative dispute resolution including mediation, conciliation, fact finding and several forms of arbitration.

Ms. Hesse sits on the Board of the International Foundation of Employee Benefit Plans, chairs its Government Liaison Committee, and formerly chaired its Attorneys Committee. She also served as president of the International Society of Certified Employee Benefit Specialists. She sits on the editorial board of Benefits Quarterly, the Pension Editorial Advisory Board for Wolters Kluwer (which houses brands such as Aspen Publishing and CCH), and formerly wrote the legal column for Aspen Publishers, Inc. Managing Employee Health Benefits. Ms. Hesse speaks frequently on employment and benefits issues.

A graduate of Smith College and Boston University School of Law, Ms. Hesse is admitted to the federal and state trial and appellate bars in Massachusetts and the District of Columbia and the Supreme Court of the United States. Ms. Hesse has received a number of awards for her professional service and for her

charitable commitments including the 1997 recipient of the prestigious Cushing-Gavin Award for excellence in providing legal counsel.

MURPHY HESSE TOOMEY & LEHANE LLP

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ERISA UPDATE: PART 1

RECENT LEGAL DECISIONS AND HOW THEY AFFECT YOUR PLAN

Presented by

Katherine A. Hesse

Murphy, Hesse, Toomey & Lehane, LLP

May 12, 2016

Key West Marriott Beachside, Key West

Overview

- Selected United States Supreme Court Cases
- Ten Tips to Avoiding Litigation
- Other Recent Cases and Trends (these are in Part 2 but will not be covered in the Part I presentation.

Litigation Trends

- According to recent article BenefitsPro magazine, the largest ERISA class action settlements topped $1.3 billion in 2014, almost ten times the sum of the largest settlements for 2013.
- The next largest year was 2011 with $900 million.
- No other area of employment workplace law has seen this kind of growth last year.
  - the largest employee discrimination settlements were $228 million.
  - the largest wage and hour approx. $215 million.

Litigation: Why do you want to avoid it?

- Knowing what types of cases end up in court and how those cases are decided can help keep you out of court.
- It can also help you learn how to document your own due diligence and attention to process which can help you win many cases.
- It will make you aware of the mistakes made by your peers and how to avoid them.

Selected United States Supreme Court Cases

King v. Burwell, 135 S. Ct. 2480 (6/25/15).

- Another ACA challenge fails:
  - The Supreme Court in a 6-3 opinion written by Chief Justice Roberts upheld tax credits for individuals for health insurance premiums under the ACA as applied to individuals in states with federally-run exchanges as well as state-run exchanges.

ACA Upheld

- As the Court emphasized in its decision, Congress passed the ACA in order to:
  - increase the number of insured Americans
  - minimize adverse selection (*i.e.*, the phenomenon of sick people being more likely to buy insurance than healthy people)
  - lower health insurance premiums
- These goals all require broadening the health insurance risk pool to include healthy individuals.

ACA Upheld

- ACA requires most individuals to have health insurance or face a penalty tax (the “individual mandate.”)
- The ACA also provides federal tax credits to offset the cost of the individual mandated insurance premiums.
- However, the individual mandate only applies to individuals when the insurance is considered “affordable.”
- Affordability is determined by comparing income to the cost of the insurance minus the tax credit.

ACA Upheld

- Without the tax credit, many would not be required to buy insurance because it would not be "affordable," and so fewer healthy individuals would be brought into the risk pool.
- The ACA also requires insurance companies to offer insurance regardless of health status.
- Thus, without the individual mandate, premiums would skyrocket because there would be more sick people in the risk pool with no incentive for healthy people to join that pool.

ACA Upheld

- ACA requires all states to have government-regulated health insurance marketplaces, called "exchanges," where individuals who do not have insurance through their employers can purchase individual coverage.
- States can create their own exchanges or rely on the federal government to run exchanges for them.
- Thirty-four states currently utilize this federal option, with sixteen running their own exchanges.

ACA Upheld

- IRS had interpreted ACA to provide subsidies both in states that set up their own exchanges and in other states with federally run exchanges.
- In King v. Burwell, two individuals from Virginia, which has a federally-run exchange, did not want to buy health insurance.
- They seized upon a phrase in the ACA stating that tax credits are available for those enrolled in HI plan through "an Exchange established by the State."

ACA Upheld

- If successful, their argument would have effectively gutted the individual mandate by making health insurance “unaffordable” for many more individuals in states with federally-run exchanges …
- …but the ACA survived.

ACA Upheld

- U.S. Supreme Court found the phrase ambiguous, thus it needed to look at the ACA in its entirety, and with its overall goal kept in mind.
- Congress passed the ACA "to improve health insurance markets not to destroy them. If at all possible we must interpret the Act in a way to be consistent with the former, and avoid the latter."
- Supreme Court upheld IRS interpretation providing tax credits for individuals regardless of what type of exchange existed in their states.

ACA Upheld

- What this case means for practitioners:
  - In one sense, nothing – the Court has merely refused to strike down existing law thus preserving the *status quo.*
  - Note that case only addresses individuals without insurance available through their employers – if an employee has insurance available through his employer, he cannot purchase subsidized insurance through the exchange.
  - King v. Burwell did not challenge the employer mandate.

ACA Upheld

- Bottom line: although there are other legal challenges being litigated and possible activity by Congress, it is time to move forward with steps necessary to be in compliance with the Act.
  - Note in mid-July 2015, the Little Sisters of the Poor lost their case re registering religious objection to contraceptive coverage.
- Among the issues to watch going forward are the definition of full time employee, the Cadillac tax, wellness programs, etc.

ACA Upheld

- Guidance is anticipated prior to 2017 regarding how larger employers may purchase insurance through the exchanges.
- Cadillac tax which had been set for 2018 has been delayed for two years to 2020.
- Stay tuned for further guidance or legislation prior to the 2020 implementation of the Cadillac tax.

Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Burwell, 136 S. Ct. 446, 193 L. Ed. 2d 346 (2015).

- In March, the Supreme Court heard oral arguments on a group of cases challenging the ACA contraception coverage mandate and its religious objection exemption procedure as applied to non-profit religious organizations.
- In 2014, the Court had ruled in Burwell v. Hobby Lobby that a private, closely held corporation was not required to provide contraception coverage through its employer health plans if the principles of the corporation objected on religious grounds.

ACA Contraceptive Mandate Challenge

- The Court in this decision noted the existence of a regulatory exemption that allowed non-profit religious organizations to opt out of the contraception coverage mandate.
- Several non-profit organizations are challenging that exemption process as being overly burdensome on their free exercise of religion.

ACA Contraceptive Mandate Challenge

- Under ACA regulations, a non-profit religious organization that objects on religious grounds to paying for contraception through its insurance plan can
  - file a form with its third-party administrator or insurance issuer, or
  - notify the US Department of Health and Human Services.
- the administrator or issuer would then independently provides the required contraceptive coverage, with no financial or any other type of involvement by the objecting organization.

ACA Contraceptive Mandate Challenge

- The Supreme Court will decide in these cases whether this “opt-out” process violates the organizations’ statutory and constitutional rights to free exercise of religion.
- The cases cover not only employers but also other types of plans, such as those for students of religious universities.

ACA Contraceptive Mandate Challenge

- In an unusual move, the Court issued an order a week after oral arguments requesting the parties to brief the Court on a possible compromise.
- The Court's order offered as an example an arrangement whereby a non-profit organization need only state to its administrator or issuer that it will not pay for contraceptive coverage, as part of negotiations over plan terms, leaving it to the administrator or issuer to arrange for the necessary coverage.

Gobeille v. Liberty Mutual Ins. Co., 136 S. Ct. 936 (3/1/ 2016).

- The Supreme Court recently ruled that a Vermont health insurance reporting law was preempted by ERISA.
- Approximately eighteen other states have similar data-collection laws in place. These laws aim at improving health care service pricing transparency and allow states to study health care and insurance costs.

ERISA Pre-empts Vermont Health Data Law

- The Vermont law required health insurers, health care providers, health care facilities, and governmental agencies to report any "information relating to health care costs, prices, quality, utilization, or resources," including health insurance claims and enrollment data.
- The law authorized the enforcing state agency to specify additional types of information and issue reports based on the data it received.

ERISA Pre-empts Vermont Health Data Law

- Liberty Mutual sponsored a health insurance plan for its employees and contracted with Blue Cross as third-party administrator for the plan. Liberty Mutual indemnified Blue Cross for any legal claims related to the plan.
- Liberty Mutual directed Blue Cross not to report the required information out of concern that the disclosure would violate its fiduciary duties under ERISA, and sued for declaratory judgment in federal court to this effect.

ERISA Pre-empts Vermont Health Data Law

- ERISA pre-empts “any and all state laws” “as they may now on hereafter relate to any employee benefit plan. Case law describes two categories affected:
- (1) State law directly references ERISA plans, or
  - 2)State law has an impermissible “ connection with” ERISA plans, meaning that it
    - governs a central matter of plan administration or
    - interferes with nationally uniform plan administration.
- A state law may also be pre-empted if it has acute economic effects on ERISA plan administration.

ERISA Pre-empts Vermont Health Data Law

- Here, the Court found that the state law has an impermissible “ connection with” ERISA plans in that as to "the law interfered with nationally uniform plan administration.
- The Court noted that “reporting, disclosure, and recordkeeping are central to, and an essential part of, the uniform system of plan administration contemplated by ERISA.”

ERISA Pre-empts Vermont Health Data Law

- Pre-emption is necessary in order to prevent multiple jurisdictions from imposing different or even parallel regulations, creating wasteful administrative costs and threating to subject plans to liability.

- The Court noted that the U.S. Secretary of Labor could request the type of information Vermont and other states wish to study.

ERISA Pre-empts Vermont Health Data Law

- The court found no need to address the "anti-pre-emption" provisions of ACA as the basic ERISA pre-emption provisions maintain their pre-emptive force whether or not the new ACA reporting obligations also pre-empt state law.
- Gobeille strikes a blow to state efforts to study and control health care and insurance costs. It remains to be seen if states will be able to collaborate with the federal government to collect the data they need.

Self-Insurance Institute of America, Inc. v. Snyder, 761 F.3d 631 (8/4/2014)

- In a separate decision, the Court also reversed and remanded another state-law preemption case in light of the Gobeille ruling.
- The Sixth Circuit had held that a state tax on paid health insurance claims was not preempted by ERISA.

Obergefell v. Hodges,135 S.Ct. 584 (6/26/15).

- In a 5-4 decision, the Supreme Court held that state laws banning or refusing to recognize same-sex marriage are unconstitutional under the Fourteenth Amendment to the United States Constitution.
- The Court held that both the due process and the equal protection clauses of the Fourteenth Amendment provide that same-sex marriage is a fundamental right.

Same-Sex Marriage

- Two years ago in United States v. Windsor, the Court examined the section of DOMA defining marriage for purposes of federal law as exclusively opposite-sex unions.
- The Windsor Court struck down that section of DOMA as unconstitutional based on principles of state autonomy, equal protection, and liberty.

Same-Sex Marriage

- Obergefell Court recognized for the first time that the right to marriage extends to same-sex unions under state law.
- It found that, under the 14th Amendment, states must
  - license marriages between two people of the same sex, and
  - recognize same sex marriages licensed in other states.

Same-Sex Marriage

- Justice Kennedy wrote that
  - Protected fundamental liberties are tied to "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."
  - Marriage is a fundamental right "inherent in the liberty of a person" thus same –sex couples may not be deprived of the right to marry.

Same-Sex Marriage

- What this case means for benefits practitioners:
- Same-sex spouses must be treated the same as opposite-sex spouses.
- Same-sex marriages from other states must be recognized.
  - Equal treatment applies to day-to-day administration, not just plan terms.
    - Example: if you don't ask opposite-sex couples for proof of marriage, can you ask same-sex couples for a marriage certificate?

M&G Polymers USA, LLC v. Tacket,135 S. Ct. 926 (1/26/15).

- In a unanimous decision, the Supreme Court disapproved of a series of Sixth Circuit cases that had found expired collective bargaining agreements ("CBAs") to grant lifetime benefits to retirees.
- The Supreme Court made it clear that CBA's, including those establishing ERISA plans, should be interpreted according to ordinary principles of contract law.

Retiree Health Benefits

- Manufacturing plant had workers under CBA providing:
  - employees retiring after a certain date "will receive" employer-funded health benefits.
  - health benefits as described would be "[e]ffective January 1, 1998, and for the duration of this Agreement thereafter. . . ."
  - CBAs would be renegotiated after 3 years.
  - CBAs were silent on the specific issue of the duration of retiree health benefits.

Retiree Health Benefits

- In 2006, after CBAs had expired, the employer began requiring retired employees to contribute toward the cost of their health insurance benefits.
- Two retired employees brought a class action suit under the Labor Management Relations Act and ERISA seeking to require the employer to continue paying the full premium cost for their lifetimes.

Retiree Health Benefits

- Sixth Circuit ruled for the retirees as it had in several similar prior cases.
- In this case, the Sixth Circuit reasoned:
  - CBA was ambiguous because there was no specific durational provision.
  - Promise to pay for benefits would be “illusory” for employees who retired early but did not reach age 65 (necessary for eligibility for these benefits) within the 3-year life of the CBA.

Retiree Health Benefits

- The Sixth Circuit found the parties intended the promise to pay for retiree health benefits to last for the entire lifetimes of the employees.

Retiree Health Benefits

- The Supreme Court found that the Sixth Circuit decision rested on principles not in accordance with ordinary principles of contract law. It reasoned:
  - ERISA does not provide vesting for health benefits as it does the pension benefits.
  - Employers have “large leeway to design…welfare plans as they see fit.”
  - CBA’s must be interpreted in light of ordinary principles of contract law and the intent of the parties instead of placing “a thumb on the scale in favor of vested retiree benefits.”

Retiree Health Benefits

- When the words of a contract are clear, its meaning is to be “ascertained in accordance with its plainly expressed intent.”
- Where ambiguous, a court may look to actual (not inferred) known customs or usages in a particular industry.
- The Supreme Court disagreed with Sixth Circuit’s refusal to apply the general duration clause to retiree benefits. Sixth Circuit had required contract to include specific durational clause for retiree health benefits in order to prevent them vesting.

Retiree Health Benefits

- The Supreme Court sent the case back to Sixth Circuit, with instructions to apply ordinary principles of contract law.
- Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, concurred, noting, however, that certain CBA provisions might be read to create a lifetime benefit.

Retiree Health Benefits: Lessons Learned

- Include clear duration provision in your CBA's.
- Make clear that general duration clause applies to all promises in the CBA unless a different date is set forth in CBA.
- Think about what happens at CBA expiration and during ongoing negotiations.
- Consider whether specific duration clauses for certain provisions make sense.
- Consider sunset clauses requiring extensions for certain benefits to continue.

Retiree Health Benefits

- If you include a durational provision for a specific promise in your CBA, in addition to the general duration clause, make clear that the inclusion of the specific durational language does not mean other promises stay in force past CBA expiration.

Tibble v. Edison International,135 S. Ct. 1823 (5/18/15).

- U.S. Supreme Court ruled in unanimous statute of limitations decision that pension plan fiduciaries can be liable for **continuing** to include a particular investment option for a 401(k) plan, and not simply for the initial decision to include the investment option.
- Fiduciaries have a duty to monitor the continued prudence of earlier decisions.

Duty to Monitor

- Edison International ("Edison") had a 401(k) plan for its employees.
- Edison provided several different investment options for the 401(k) participants, including both institutional-class and retail-class mutual funds.
- Retail-class mutual funds were more expensive to participants but otherwise identical to institutional-class funds.

Duty to Monitor

- Hewitt, Edison, and the selected mutual funds engaged in an arrangement known as “revenue sharing,” wherein the mutual funds passed on fees they charged investors to Hewitt as compensation for administering the plan.
- Hewitt then passed those fees onto Edison in the form of a discount on its services.

Duty to Monitor

- In 2007, Glenn Tibble and other Edison employees sued under ERISA, which requires fiduciaries of an employee benefit plan to administer the plan prudently and for the exclusive benefit of the participants.
- The Employees alleged, among other claims, that including the retail-class funds was imprudent because there was a materially identical but less expensive alternative available (*i.e.*, institutional-class funds).

Duty to Monitor

- The district court dismissed these claims as untimely because the decision to include the retail-class funds occurred outside (earlier than) the applicable six-year limitations period.
- The district court rejected the employees' argument that continued inclusion of the higher cost funds in the benefit plan was a continuing violation of ERISA.

Duty to Monitor

- The Ninth Circuit agreed with the district court and dismissed the claims.
- However, the Ninth Circuit noted that a decision to continue a particular investment offering could constitute a violation, but only if the claimant could show "significant changes in conditions occurr[ing] within the limitations period that should have prompted a full due diligence review of the funds."

Duty to Monitor

- The Supreme Court reversed and remanded the case back to the Ninth Circuit.
- According to the Supreme Court, the Ninth Circuit failed to apply traditional trust law principles to the continued offering of the retail-class funds.
- Since plan fiduciaries have a continuing duty to monitor plan investments, any claim falling within the applicable statute of limitations could be considered.

Duty to Monitor

- Under trust law, a plan fiduciary is obligated to:
  - Regularly review all investment offerings
    - the timing and extent of which will depend on the surrounding circumstances, and
  - Dispose of imprudent investments within a reasonable amount of time.

Duty to Monitor

- Interestingly, by the time the parties submitted briefs to the Supreme Court, both parties agreed that Edison had a continuing duty to monitor investments and remove imprudent ones.
- The Supreme Court refused to address with any further specificity the only remaining dispute on this issue, namely, the scope of that duty to monitor and whether the challenged investment offerings should have been removed. Instead it sent the case back to the Ninth Circuit.

Duty to Monitor: Lessons Learned

- Invest prudently according to your statement of investment policy, using professional assistance when appropriate.
- Document the process used in arriving at the investment decision, noting why decisions are made, for example, to go with retail funds.
- Monitor those investments by performing regular reviews of investment offerings and other investment decisions for your 401(k) and pension plans.

Montanile v. Board of Trustees of Nat. Elevator Industry Health Benefit Plan, 2016 WL 228344, ___S.Ct. ___ (1/20/16)

- *Subrogation* – Supreme Court held that ERISA-governed employee benefit plan cannot bring a reimbursement claim against the general assets of a beneficiary.
  - This is only a minor extension of a principle established by the Supreme Court in 2002 (Great-West Life & Annuity Ins. Co. v. Knudson)

Subrogation

- Here, plan beneficiary was insured through employer's health insurance plan, which reserved the right to third-party payments to beneficiary for medical claims.
- Plan paid out medical claims to beneficiary for injury for which beneficiary later received a settlement from a third party.
- Plan tried to recover reimbursement from beneficiary, but beneficiary's lawyer challenged.

Subrogation

- Beneficiary's lawyer was holding the settlement funds temporarily while they negotiated.
- After negotiations broke down, the lawyer gave notice to the plan that he intended to distribute the funds (minus attorney's fees) to the beneficiary. The plan did not respond, so the beneficiary received the money.
- Plan waited 6 months before suing for the settlement funds, by which point most of the proceeds had been spent.

Subrogation

- ERISA limits plans to “equitable” claims, which the Supreme Court has interpreted to mean that a plan cannot simply recover money owed to it; rather, a plan can only recover a specific, identifiable fund that rightfully belongs to the plan.
- The plan here had tried to argue that because the beneficiary had the money at one point in time, an “equitable lien” attached, allowing the plan to collect what it was owed from the beneficiary’s general assets.

Subrogation

- The Court disagreed, ruling for the beneficiary.
  - Although not helpful to the plan in this case, the Court noted that a plan may be allowed to recover money from a specific account when settlement funds were "co-mingled" with funds in that account.
- Lessons learned:
  - Plan terms like subrogation may have less force than they appear, due to ERISA's limitations on recovery.
  - Act quickly to collect money owed, before the money is distributed and/or spent.

E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 127 FEP 157 (BNA) (6/01/15).

- The Supreme Court held, 8-1, that under Title VII, employers need not have actual knowledge of an employee's or applicant's religious belief or practice in order to be liable for religious discrimination.
  - Unconfirmed suspicion of the possible need for a religious accommodation, the Court found, was sufficient to hold an employer liable under Title VII.

Religious Accommodation

- The facts alleged in this case are as follows:
  - A Muslim woman interviewed for a sales position at Abercrombie & Fitch while wearing a head scarf which she wore for religious reasons.
  - Abercrombie & Fitch had a “Look Policy” for its sales staff that prohibited headwear.

Religious Accommodation

- The candidate scored well in the interview, but the interviewer was not sure whether to hire the candidate due to the apparent conflict between the candidate's headscarf and the "Look" policy.
- Importantly, the candidate never said anything about her hijab or her religion, and the interviewer never confirmed her assumption that the candidate wore the scarf for religious reasons and would need to wear the scarf at work.

Religious Accommodation

- The interviewer consulted with the district manager, who instructed the interviewer not to hire the candidate.
- The interviewer followed the instructions and did not hire the candidate.
- There was still no communication between Abercrombie & Fitch and the candidate about her religion or the possible need for an accommodation regarding the “Look Policy”.

Religious Accommodation

- The Equal Employment Opportunity Commission (EEOC) brought suit under Title VII for religious discrimination on behalf of the candidate.
- Abercrombie & Fitch asserted as a defense that it cannot be liable for religious discrimination when the candidate never mentioned her religion or the need for an accommodation for her religious practices.

Religious Accommodation

- The law:
  - Title VII prohibits discrimination “because of” religion, which is defined to include “all aspects of religious observance and practice, as well as belief.”
  - Generally, an employer is required to accommodate an employee’s or job applicant’s sincerely held religious beliefs unless such accommodation would constitute an undue hardship.

Religious Accommodation

- As Justice Scalia explained in writing for the majority in this case, “Title VII does not demand mere neutrality with regard to religious practices – that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not ‘to fail or refuse to hire or discharge any individual . . . because of such individual’s’ religious observance and practice.”

Religious Accommodation

- Supreme Court held that if an employer suspects that an employee or job applicant requires a religious accommodation, Title VII's "favored treatment" applies.
- However, it is important to note an employer will not be liable under Title VII unless the individual actually has a "sincerely held" religious belief. (*i.e.*, if the candidate in this case wore a head scarf without any religious reason for doing so, Abercrombie & Fitch would not be liable, despite its suspicion of religious motivation.)

Religious Accommodation

- Take-away:
  - Make all reasonable attempts to accommodate religious employees and job candidates.
    - This may include reaching out to employees or candidates when the employer has some reason to suspect that the employee may need an accommodation.
  - Review any “look” policies for possible conflicts with religious practices.

Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513 (12/9/14).

- The Supreme Court held (9-0) that warehouse employees did not have to receive compensation under the Fair Labor Standards Act (FLSA) for time spent going through an anti-theft security checkpoint before leaving work.

Payment for Pre- and Post-Work Activity

- Facts:
  - Integrity Staffing Solutions, Inc., employs warehouse workers for Amazon.
  - Integrity required the workers to go through a metal detector and empty their pockets after each shift as an anti-theft measure.
  - The employees often had to wait in line for upwards of 25 minutes, none of which was paid.
  - Two former employees sued for wages under the FLSA.

Payment for Pre- and Post-Work Activity

- The law:
  - Generally, the FLSA does not require paying wages for "preliminary" or "postliminary" activities, such as showering and changing in and out of uniforms.
  - However, such activities may be compensable if considered integral and indispensable to the employee's principle work activities.
    - *E.g.*, showering could be compensable if the employees worked with harmful chemicals.

Payment for Pre- and Post-Work Activity

- The employees had argued the security check was compensable because it was mandatory and for the sole benefit of the employer.
- The Supreme Court disagreed, ruling in favor of Integrity Staffing and noting that the employees' argument relied on an incorrect standard.
- The Court found that the security checks were not indispensable to the employees' warehouse work.

Payment for Pre- and Post-Work Activity

- The employees had also argued that the time was compensable because the employer could make the lines move more quickly but had not done so.
- The Supreme Court rejected this argument as well, noting that the relative efficiency of a postliminary activity has no bearing on its relationship to the employees' primary duties.

Payment for Pre-and Post-Work Activity: Lessons Learned

- Determination of non-compensable activities is very fact-specific.
- While the employer ultimately prevailed here, litigation likely could have been avoided if the lines had not been so slow – be efficient and respectful of employee time.

Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 126 FEP 765 (BNA), (3/25/15).

- The Supreme Court articulated the standard for showing pregnancy-based gender discrimination under Title VII for an employer's light-duty policies.

Light Duty

- Facts:
  - UPS had a temporary light-duty policy for its drivers available to:
    - Employees injured on the job.
    - Employees with ADA-qualifying disabilities.
    - Employees who temporarily lost their certification from the U.S. Department of Transportation.

Light Duty

- Facts, cont'd:
  - Peggy Young was a driver for UPS.
  - One of her essential job duties was being able to lift up to 70 lbs., though in practice she mostly carried much lighter letters and packages.
  - Young became pregnant and her doctor restricted her maximum lifting to 20 lbs.
  - Young requested to work light duty, but UPS denied the request because she did not fall within one of the three light-duty policy categories.

Light Duty

- Young sued under Title VII as amended by the Pregnancy Discrimination Act, arguing that if an employer allowed light duty for any one group of employees, it must allow light duty for pregnant employees as well.
- UPS argued that Title VII only prohibited policies that explicitly excluded pregnant employees.
- The Supreme Court rejected both arguments, articulating a standard between the two positions.

Light Duty

- Under the Court's ruling, a qualifying employee may reach a jury in facially neutral light-duty policies by showing:
  - the policies impose a "significant burden" on pregnant workers; and
  - the employer's non-discriminatory justification for the policies is not sufficiently strong to justify the burden, and so, when considered along with the burden imposed, gives rise to an inference of intentional discrimination.

Light Duty

- The Court declined to rule on the ultimate merits of the case, instead remanding the case for reconsideration based on the articulated standard.
- However, the Court provided some guidance by noting that a plaintiff may demonstrate that the employer's policies create a "significant burden" by showing that an employer accommodates a "large percentage" of non-pregnant workers while failing to accommodate a large percentage of pregnant workers.

Light Duty

- Note, that the Court did not rule on the 2014 EEOC guidelines.
- The EEOC may pursue a discrimination claim against an employer that has any kind of light duty policy that does not include pregnant workers.

Light Duty

- Lessons learned:
  - Look at all of your light-duty policies, as a whole, and if there are any categories of workers excluded, make sure you have strong and substantiated reasons for excluding those groups.
  - Consider specifically how those policies affect pregnant workers. If they do not presently provide pregnant workers with an opportunity to work light duty, consider whether they should.

Friedrichs v. California Teachers Ass'n, No. 14-915, 2016 WL 1191684 (3/29/16)

- In a split decision without written opinion, the Supreme Court effectively affirmed a lower court decision allowing the state of California to assess agency fees against employees opting not to join the unions that represent their interests in collective bargaining.

Agency Fee Decision Affirmed 4-4

- A prior Supreme Court case, Abood v. Detroit Bd. of Ed., upheld these fees in the face of First Amendment challenges, so long as the unions only use the agency fees for activities "germane" to collective bargaining.
- The relatively short lower court decision in Friedrichs merely cites to this precedent as controlling and rules in favor of the union.

Agency Fee Decision 4-4

- Supporters of agency fees argue that the absence of such fees will allow employees to benefit financially from the existence of a union without needing to provide any financial support, and so will be incentivized not to join.
- A decision to overturn the lower court on the merits in this case could have posed a significant threat the financial viability of public unions nation-wide.

Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645, 126 FEP 154 (BNA) (4/29/15).

- Supreme Court held unanimously that courts can conduct limited reviews of the EEOC's obligation to attempt settlement prior to bringing suit.
- In a gender discrimination suit by the EEOC, the employer defended by claiming that the EEOC failed to engage in meaningful settlement attempts.
- Federal law requires the EEOC to "endeavor to eliminate [an] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

EEOC Obligation to Attempt Settlement

- The Supreme Court held that a court can review EEOC compliance with this requirement, but only so far as to see whether the EEOC provided notice of the basic facts of the allegations at issue and tried to engage the employer in settlement.
- Take-home lesson:
  - Document your availability and willingness to take part in EEOC settlement attempts.
  - That does not need to prejudice your position or indicate willingness to grant concessions.

Department of Homeland Security v. MacLean, 135 S. Ct. 913 (1/21/15).

- In 2003 the TSA stopped assigning air marshals to certain longer flights due to budgetary constraints, despite having specific intelligence that terrorists planned to hijack planes on those types of flights.

- When an air marshal's internal protests went nowhere, he turned to MSNBC, eventually getting the flight assignments back to prior levels.

Whistleblower Protection

- Federal whistleblower statute protected his action even though they clearly violated TSA regulations, because his actions were not “prohibited by law.”
- Lesson learned:
  - While regulations can be helpful guides, laws trump regulations.
  - Consult with qualified counsel before taking adverse action against a whistleblower.

Remember The Guiding Principles: The D's

- **D's to Remember:**
  - Dignity
  - Discretion
  - Diversity
  - Disclosure
  - Due Diligence
  - Due Process
  - Documentation
- **D's to Avoid:**
  - Delay
  - Discrimination
  - Deceit

Dignity

"Don't look at this as a demotion, look at it as the stripping away of your last shred of dignity."

Dignity

- Treat employees with courtesy and respect
- Listen carefully
- Be as responsive as possible
- Practice the Golden Rule
- Example this year? Integrity Staffing.

Discretion

Retain Discretion, But Exercise It Consistently!

Discretion

- Make sure CBAs/policies/handbook/plans provides discretion to the employer/administrator
  - to construe, interpret and apply terms and to resolve ambiguities;
  - to amend or change those policies/handbooks/plans at any time.
- Employee communications such as handbooks should also include both discretionary language and right to amend.

Discretion

- Exercise discretion reasonably and consistently.
  - Provide adequate notice/avoid retroactive amendments whenever possible.
- Still must comply with the law, the CBA, and your own policies.
- Example: Dutkewych.

Disclosure/Loose Lips Sink Ships

Disclosure/Loose Lips

- Use all available communications opportunities and frame communications so that they will be most likely to be understood by all. *E.g.*, Yafei.
- Avoid legal or highly technical language.
- And always remember: loose lips sink ships!
- *E.g.*, Monper, Guerra.

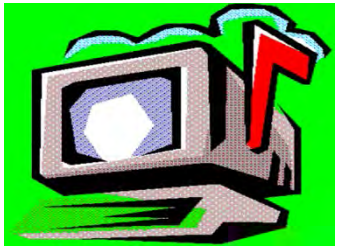
Due Diligence

Due Diligence

- Due diligence means doing your homework.
- Investigate thoroughly: don’t rely on stereotypes, hearsay, or assumptions.
- Due diligence is important in all aspects from the communications effort to the investigation and the ensuring of consistent treatment, from the adoption of an investment policy to the careful selection of investments and the regular review and monitoring of same.

Due Diligence

- Stay current and get appropriate advice before taking the action
  - Retain appropriate expertise if you are not adequately qualified.
  - Remember to monitor the professionals that you do select; sift all recommendations with an eye to practicalities, financial and legal ramifications and public perception.
  - Document your review process and why you made the decisions you did.
  - Example this year? Tibble.



Due Process

Due Process

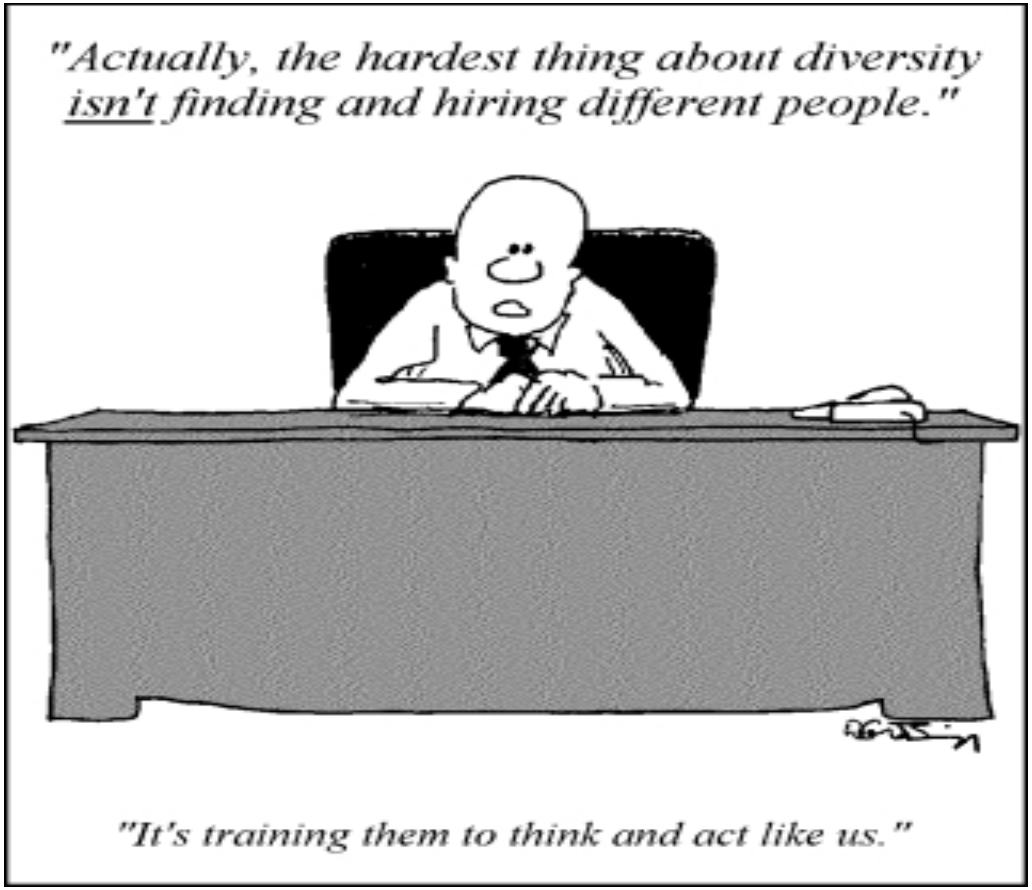
- Develop sound policies and procedures and adhere to them.
- Beware of overly complicated processes.
- Usually, processes should be in writing or otherwise clearly published.
- Importance of both procedural and substantive due process.
- This year's example: Tibble, Orr.

Documentation

Documentation

- The reasons for good documentation are many, not the least of which is that judges, juries, arbitrators, and administrative agencies expect it.
- Know the difference between good and bad documentation.
- Don’t promise more documentation then you can deliver.
- Document facts rather than conclusions.
- Example this year: Tibble, M&G.

Diversity



Diversity

- Age
- Gender
- Ethnic background
- Race
- Religion
- National origin
- Disability
- Color
- Gender identity
- Sexual orientation
- Military service or Veteran status
- Genetic Information

Diversity

- Primary Language
- Neighborhood/school attended
- Introvert or extrovert
- Understand directions more readily orally - don't read well
- Detail or big picture person
- Leader or follower
- Close talker/loud mouth/loner

Diversity

- Cultural competency is the watchword.
- Be sensitive to people's varying backgrounds and special needs.
- Develop a communication style that works for you and then adapt as needed to each individual's needs.
- Create an atmosphere of dignity and respect where each person feels that their contributions are valued and where diversity is celebrated.
- Be alert to possible accomodations that may be needed.
- This year's example: Abercrombie.

Delay

Delay

- Act/Respond as promptly as possible under the circumstances.
- Always adhere to any time limits set forth in your CBA, policies, employee handbooks, or other relevant source.
- Document agreements to extend timelines.
- Investigations should be as prompt as possible under the circumstances.
- Keep employees informed of need for additional time.

Delay

- Be proactive – try to anticipate potential issues and plan your strategy ahead of time so that you can respond quickly.
- Examples this year include Tibble, Montanile, and Young.

Discrimination

"Why me and not you?"

Discrimination

- Avoid illegal discrimination or the appearance of it.
  - Remember an intent to discriminate is not necessary if there is an adverse disparate impact on a protected class.
- Consistency is perhaps the single most important guiding principle in handling workplace issues.

Discrimination

- This consistency should include:
  - Consistency with the CBA/handbook/policy and how it has been previously interpreted and applied to other employees.
  - Consistency among departments, divisions, locations, and supervisors.
  - Internal consistency vis-à-vis the employee.
- Examples this year: Abercrombie and Young.

Deceit

Deceit

- It is better to say nothing than to lie.
- Using a false reason for a job action can cause an inference of discrimination.
- Guerra?

Questions?

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GLSA/GP Solo Joint 2016 Spring Meeting

ERISA UPDATE: Part 2

Supplementary Lower Court Cases

Presented by

Katherine A. Hesse

Murphy, Hesse, Toomey & Lehane, LLP

May 12, 2016

Key West Marriott Beachside, Key West, Fl

Discretion and Diligence

- Focus on Discretion and Due Diligence
- Give yourself **D**iscretion to interpret the plan
  - Under the Firestone decision, courts will defer to reasonable determinations by plan administrators if the plan gives the administrators discretion.
- Due Diligence: **D**raft clear terms. If a staff member misrepresents a plan provision, clear enough plan terms may save the day.

Diligence and Documentation

- **D**iligence in training your recruiters
- **D**ocument your diligence!
- **D**ue Process: Focus on making sure you have a solid internal review process.
  - If the plan has an internal review process, a claimant normally cannot go to court without exhausting that first.

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir. 5/19/15).

- *Claim determinations* – A life insurance policy claimant's lawsuit was dismissed for failure to exhaust policy's internal complaint review process.

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir. 5/19/15),cont'd.

- Facts:
  - Daniel Orr was a participant in his employer's life insurance policy, which was administered by Union Security Insurance Company ("USIC").
  - The policy contained a provision disallowing benefits for death or dismemberment that was caused directly or indirectly by the policy holder's intoxication.
  - The policy also contained a 2-step internal review process for aggrieved claimants.

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir. 5/19/15),cont'd.

- Facts, cont'd:
  - Mr. Orr was killed in a motorcycle accident and his two daughters filed claims under the plan.
  - USIC denied the claims due to evidence Mr. Orr was intoxicated and USIC's expert's opinion that Mr. Orr's response time was impaired.
  - The denial letter enclosed notice of the claim review process, highlighting the deadlines and noting that failure to exhaust the process would preclude an ERISA appeal in court.

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir. 5/19/15),cont'd.

- Facts, cont'd:
  - The Orrs sent a timely letter indicating their intent to seek internal review but requesting an extension to submit the appeal and requesting certain documents from USIC.
  - USIC sent the documents and granted the extension.
  - The Orrs submitted their appeal, which USIC denied, again with notice of the 2-step review process.

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir. 5/19/15),cont'd.

- Facts, cont'd:
  - The Orrs sent another letter challenging the denial and claiming they exhausted the internal review process, but also acknowledging that there was a further level of internal review.
  - The letter further stated that the Orrs were investigating the case and would provide more documentation at a later date.

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir. 5/19/15),cont'd.

- Facts, cont'd:
  - However, four days after sending the letter, the Orrs filed suit.
  - At first unaware of the lawsuit, USIC responded to the letter asking when the Orrs intended to send further documentation.

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir. 5/19/15),cont'd.

- The district court ruled in favor of USIC, finding that the Orrs failed to exhaust the internal review process as required by ERISA, and the Seventh Circuit Court of Appeals agreed and affirmed.

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir. 5/19/15),cont'd.

- ERISA requires plans to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim."
- It is generally settled under ERISA that plans can establish mandatory internal review procedures and that a claimant must exhaust those entire procedures before requesting relief from a court.

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir. 5/19/15),cont'd.

- A claimant can be excused from the exhaustion requirement, but only when a claimant can show that internal review:
  - would be futile,
  - would not provide an adequate remedy, or
  - would not provide access to a meaningful review process.
- The Orrs' allegations did not demonstrate any such defects with USIC's review process or treatment of the Orrs' claim in particular.

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir. 5/19/15),cont'd.

- Lessons learned:
  - By incorporating a reasonable internal review process into your plan, you may reduce costly litigation over benefits denials by getting lawsuits dismissed earlier in the litigation process.
  - Being fully cooperative and accommodating with requests for documents and extensions not only maintains good relations with plan participants but also may keep you in good graces with a court in any legal challenges down the road.

Dutkewych v. Standard Ins. Co., 781 F.3d 623 (1st Cir. 3/30/15).

- *Claim determinations* – The First Circuit found that a plan administrator was reasonable in terminating disability benefits for a participant with physical and mental health problems pursuant to plan provision limiting coverage when a mental disorder contributed to the disability.

Dutkewych v. Standard Ins. Co., 781 F.3d 623 (1st Cir. 3/30/15),cont'd.

- Facts:
  - Standard Insurance Company administered a disability benefits plan that limited long-term disability benefits to "24 months during your entire lifetime for a Disability caused or contributed to by…: (1) Mental Disorders; (2) Substance Abuse; or (3) Other Limited Conditions."

Dutkewych v. Standard Ins. Co., 781 F.3d 623 (1st Cir. 3/30/15),cont'd.

- Facts, cont'd:
  - There was additional language clarifying that to receive benefits beyond 24 months you had to be fully disabled apart from any mental disorder or substance abuse.

Dutkewych v. Standard Ins. Co., 781 F.3d 623 (1st Cir. 3/30/15),cont'd.

- Facts, cont'd:
  - In the plan, Standard also retained "full and exclusive authority to control and manage the Group Policy, to administer claims, and to interpret the Group Policy and resolve all questions arising in the administration, interpretation, and application of the Group Policy."

Dutkewych v. Standard Ins. Co., 781 F.3d 623 (1st Cir. 3/30/15),cont'd.

- Facts, cont'd:
  - Participant Mark Dutkewych applied for benefits for "mental illness, substance abuse, and a dizzying array of physical symptoms that … received competing diagnoses."
  - Standard approved his benefits for 24 months but terminated them under the Limitation clause, and affirmed the termination on internal appeal.

Dutkewych v. Standard Ins. Co., 781 F.3d 623 (1st Cir. 3/30/15),cont'd.

- Facts, cont'd:
  - Dutkewych claimed he had chronic Lyme disease, and had been diagnosed as such by three different physicians.
  - A physician consultant hired by Standard, however, disagreed with the diagnosis, questioning even whether the medical community accepted the type of "chronic" Lyme disease diagnosis Dutkewych had received.

Dutkewych v. Standard Ins. Co., 781 F.3d 623 (1st Cir. 3/30/15),cont'd.

- Facts, cont'd:
  - In denying the internal appeal, Standard wrote that it could not "conclude that a Physical Disease has been identified as defined by the policy," and "[e]ven if [it was] to accept the diagnosis of Lyme disease, the consulting physician noted that the claimant may be able to work at this time if his psychiatric issues were appropriately dealt with."
  - Dutkewych sued Standard under ERISA for benefits beyond the 24 months.

Dutkewych v. Standard Ins. Co., 781 F.3d 623 (1st Cir. 3/30/15),cont'd.

- The First Circuit upheld Standard's decision.
- Because the plan gave Standard discretion to administer claims and interpret plan terms, the Court gave deference to Standard's eligibility determination, looking only for clear legal errors or a lack of evidence supporting Standard's decision.

Dutkewych v. Standard Ins. Co., 781 F.3d 623 (1st Cir. 3/30/15),cont'd.

- The Court found here that there was sufficient evidence indicating Dutkewych would not be disabled if it were not for his mental health issues, given the numerous physician reports emphasizing his ongoing depression and other related problems as well as Dutkewych's own statement that mental health problems were an important component of his disabling condition.

Koning v. United of Omaha Life Ins. Co., 2015 WL 5603094, --- Fed. Appx. --- (6th Cir. Sept. 24, 2015).

- *Claim determinations* –An administrator should explain why it makes a decision contrary to the submitted supporting documentation.
- Here, Vicki Koning worked for many years with chronic back pain, until finally reaching a point where she determined her condition prevented her from working.
- She was denied long-term disability benefits under her employer's plan.

Koning v. United of Omaha Life Ins. Co., cont'd.

- The claim administrator had found no physical change in her condition at the time she claimed benefits, and so denied the claim because she had worked with her condition for many years before.
- The court here sent the claim back to the insurance company for redetermination, finding that it failed to address medical documentation from Ms. Koning's treating physician providing a credible and well-supported opinion that she was permanently disabled.

Koning v. United of Omaha Life Ins. Co., cont'd.

- Lessons Learned:
  - The administrator should provide the reason or reasons for the denial.
  - Address countervailing evidence of all types and explain why the decision made is correct notwithstanding the contrary evidence.
  - Ignore the treating physician's evidence at your peril.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15).

- *Misrepresentations* – In this federal district court case, pension plan participants were allowed to move forward with ERISA claims against their employers and the plan's committee members for fiduciary duty breach claims based on misrepresentations by staff regarding the participants' benefits upon transferring to a new employer.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15). cont'd.

- Facts:
  - Aerospace company McDonnell Douglas Corporation administered a pension plan for its employees referred to as the "Hourly West Plan" which had an early retirement option with enhanced benefits for employees with at least 30 years of service.
  - As part of a merger, Boeing Company assumed administration of the Hourly West Plan.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15). cont'd.

- Facts, cont'd:
  - Boeing needed employees at its Washington plant for construction of the new Dreamliner aircraft, and sent recruiters to McDonnell Douglas in California.
  - The recruiters made many verbal representations to McDonnell Douglas employees that the employees' pension benefits would not be reduced by moving to the Washington plant.

Monper v. Boeing Co., __ F. Supp. 3d __ , 2015 WL 2250419 (W.D. Wash. 5/ 13/15), cont'd.

- Facts, cont'd:
  - However, when the employees transferred they were moved from the Hourly West Plan to a Boeing plan, which did not have enhanced early retirement benefits for employees with 30+ years.
  - The Hourly West Plan explicitly did not allow participants to continue accruing years of service when enrolled in the Boeing plan.
  - Several employees transferred who would have had 30 years of service by age 55.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15). cont'd.

- Three employees sued Boeing, McDonnell Douglas, and 41 HR employees and recruiters under ERISA for breach of fiduciary duties.
- The court dismissed all claims against the recruiters and HR employees because they "lack[ed] the hallmark exercise of discretionary authority or control" that would make them plan fiduciaries.
- The "ministerial act" of discussing benefits with employees is generally not sufficient to confer fiduciary status.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15). cont'd.

- The district court allowed the case to move forward against the plan committee members, however, who were clearly plan administrators and therefore fiduciaries.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15). cont'd.

- Fiduciaries have a "responsibility to provide clear and accurate information" to plan participants and beneficiaries.
- Here the Court found that the Plaintiffs alleged enough facts suggesting that the committee members should have known to inform the potential transferees of which plan they would be enrolled in upon transferring to Boeing, and could be liable for failure to monitor and train the HR and recruiting staff.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15). cont'd.

- It is important to note that the misrepresentations here did not directly conflict with plan language.
- That is, the transferees could not have known which plan language to read because the recruiters and HR staff misrepresented which plan they would be enrolled in.
- However, if the misrepresentations had directly conflicted with clear plan language, the transferred employees would most likely have had these claims dismissed.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15). cont'd.

- The court also did not dismiss claims against Boeing and McDonnell Douglas.
- Although the Plaintiffs did not present any evidence of direct involvement by the two companies, the Court found that the totality of the facts presented gave rise to an inference that the two companies were directly involved in the misrepresentations.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15). cont'd.

- Specifically, the transferred employees alleged that the two companies:
  - sent the recruiters,
  - imposed transferee quotas on the recruiters,
  - encouraged employees to consult representatives of a pension office the companies set up and maintained, and
  - stood to benefit from the misrepresentations given the staffing needs in Washington.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15). cont'd.

- Lastly, the "repetitive and uniform nature of the misleading communications made to multiple employees on separate occasions" indicated that Boeing and McDonnell Douglas were directly at fault for the misrepresentations.

Monper v. Boeing Co., 104 F. Supp. 3d 1170 (W.D. Wash. 5/ 13/15). cont'd.

- Lessons learned:
  - Train your recruiters, HR, and other staff on what to say, what not to say, and when to refer a question, regarding benefits
  - Account for relationships with other plans, plan documents, subsidiaries, mergers, etc. in your plan language

Guerra-Delgado v. Popular, Inc., 774 F.3d 776 (1st Cir. 12/18/14).

- *Misrepresentations* – The First Circuit held that an employee beneficiary could not recover promised pension benefits contrary to plan terms despite the fact that the employer made misrepresentations to the employee over several years regarding his years of eligible service and estimated benefits.
  - Unlike in Monper v. Boeing, detailed plan terms saved the day for the employer, despite years of benefits misinformation.

Guerra-Delgado v. Popular, Inc., 774 F.3d 776 (1st Cir. 12/18/14), cont'd.

- Facts:
  - A bank employee worked for three different banks over a number of years.
  - The third bank's pension plan did not permit crediting years of service from the other two.
  - According to the employee, a representative of the third bank told him as part of its recruitment efforts that he would be credited for 17 years of work for purposes of pension benefits, despite the fact that he had not worked for the third bank for any of those years.

Guerra-Delgado v. Popular, Inc., 774 F.3d 776 (1st Cir. 12/18/14), cont'd.

- Facts, cont'd:
  - Several years later, the employee asked the benefits department whether he was still being credited for years worked dating back to 1980, and received a responsive letter confirming that he was.
  - He thereafter received annual reports showing pension benefit estimates reflecting the seventeen prior years of service, with a disclaimer that the amounts were estimates only.

Guerra-Delgado v. Popular, Inc., 774 F.3d 776 (1st Cir. 12/18/14), cont'd.

- Facts, cont'd:
  - At one point the bank changed its pension plan, freezing the benefits of all employees with less than 10 years of service and giving them an eleven percent raise, while keeping the same plan for employees with more than 10 years of service and giving those employees a three percent raise.
  - Guerra received a letter indicating that he had more than 10 years of service.

Guerra-Delgado v. Popular, Inc., 774 F.3d 776 (1st Cir. 12/18/14), cont'd.

- Facts, cont'd:
  - Just before the employee was planning to retire, the third bank informed him that it had made a mistake and that he would not be credited for the 17 years service he had at other banks when he began working for the third bank.
  - He sued under ERISA for the benefits promised.

Guerra-Delgado v. Popular, Inc., 774 F.3d 776 (1st Cir. 12/18/14), cont'd.

- Both the district court and then the First Circuit ruled in favor of the bank.
- To prevail on a claim for benefits exceeding those provided by plan terms, a participant must show either that:
  - the plan was effectively amended, or
  - the defendant made a material misrepresentation regarding an interpretation of an ambiguous plan term that the plaintiff reasonably relied upon.

Guerra-Delgado v. Popular, Inc., 774 F.3d 776 (1st Cir. 12/18/14), cont'd.

- The First Circuit found there had been no amendment by alleged conversation with the recruiter because:
  - plans cannot be amended orally, and
  - the miscalculated benefits notices did not effectively amend the plan because they were only "estimates."

Guerra-Delgado v. Popular, Inc., 774 F.3d 776 (1st Cir. 12/18/14), cont'd.

- The Court also found the plan terms at issue were not ambiguous, meaning the employee could not show material misrepresentation because it would be unreasonable to rely on an interpretation that conflicted with contrary unambiguous language.

Guerra-Delgado v. Popular, Inc., 774 F.3d 776 (1st Cir. 12/18/14), cont'd.

- Lessons learned:
  - **D**iligence - Draft eligibility provisions in the plan clearly.
  - **D**iligence –Avoid misrepresentations altogether by training your recruiters on benefits information and on when to refer the candidate to someone more knowledgeable.
    - A single mistake can lead to years-worth of errors.

Yafei Huang v. Life Ins. Co. of N. Am., 801 F.3d 892 (8th Cir. Sept 3, 2015).

- *Misrepresentation* – An insurance company denied life insurance benefits to the wife of a deceased plan participant because the participant failed to notify the plan as to the change in his health status, which was required under the plan terms.
- The wife sued for breach of fiduciary duty (not for wrongful denial of benefits), claiming that someone working for the insurer had told her over the phone that health status was not relevant to coverage.

Yafei Huang v. Life Ins. Co. of N. Am., 801 F.3d 892 (8th Cir. Sept 3, 2015).

- The Eighth Circuit dismissed her claim, noting that the health status update requirement was clearly stated in the summary plan description and in the plan's application form.
- Lessons learned:
  - Emphasize key plan terms in your SPD and include reminders as often as feasible.
  - Train your staff on what to say, and what not to say, in response to participant and beneficiary questions.

Okun v. Montefiore Med. Ctr., 793 F.3d 277 (2d Cir. July 17, 2015)

- *ERISA coverage* – be aware that a practice that confers a severance benefit on employees could be interpreted to be an ERISA-governed plan
  - ERISA covers "any plan, fund, or program...established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries...benefits in the event of sickness, accident, disability, death or unemployment, or...any benefit described in section 186(c) of this title."

Okun v. Montefiore Med. Ctr., 793 F.3d 277 (2d Cir. July 17, 2015), cont'd.

- In the Okun case, an employer's written severance policy, which had been in place for many years, was found to be an ERISA plan.
  - Factors supporting an ERISA-governed plan:
    - Managerial discretion required
    - Indicates ongoing commitment by employer
    - Benefit has eligibility criteria requiring individualized determinations
- Contrast with Fort Halifax v. Coyne, where a one-time severance payment for a plant closing was found not to be an ERISA plan.

Okun v. Montefiore Med. Ctr., 793 F.3d 277 (2d Cir. July 17, 2015), cont'd.

- Depending on the situation, a plan sponsor or plan administrator may or may not wish an employer practice to be governed by ERISA.
  - ERISA pre-empts many state laws – which law is preferable will be fact-specific

- Keep in mind that the provision of any sort of benefit to your workers could trigger ERISA requirements.

Waskiewicz v. UniCare Life & Health Ins. Co., 802 F.3d 851 (6th Cir. Oct. 2/Dec. 7, 2015)

- Even with discretionary clauses, courts may still overturn claim determinations.
- This case presents a situation where the court overturned a claim denial that appeared entirely in accordance with plan terms because the court found the denial to be contrary to the "spirit of employer-provided health care benefits generally and with this Plan specifically."

Waskiewicz v. UniCare Life & Health Ins. Co., cont'd.

- Here, an employee had an emotional and mental breakdown for several months, and didn't report the reason for her absence from work until well after the required notification period for purposes of receiving disability benefits.
- She was terminated retroactively effective as of the first day of her absence.
- This termination date made her ineligible for disability benefits because she was not a "covered employee" at the time of disability onset.

Waskiewicz v. UniCare Life & Health Ins. Co., cont'd.

- The court ruled in favor of the claimant, explaining:
  - "An insurance policy can hardly be said to provide employee disability 'insurance' at all if it protects against sudden disability but not if the employer immediately discharges the employee because of the disability before she gets a chance to apply for the benefits."
- Lesson learned:
  - Remember fundamental fairness/the "smell" test
  - Hard facts make bad law.

N. Jersey Brain & Spine Ctr. v. Aetna, Inc., 801 F.3d 369 (3d Cir. Sept. 11, 2015)

- *Standing to sue under ERISA and assignments of rights* – medical practitioners often have their patients sign assignment-of-rights forms so that the provider can sue their patients' insurers for coverage.
- Practitioners use different language for these assignment forms, which has led to some confusion in litigation over whether the assignment is sufficient to bring suit in court.

N. Jersey Brain & Spine Ctr. v. Aetna, Inc., cont'd.

- Practitioners at the North Jersey Brain & Spine Center had patients sign forms stating that they "assigned . . . all payments for medical services rendered."
- The practitioners sued Aetna for refusing to cover certain services, and Aetna argued that the practitioners lacked standing under ERISA.
- The Third Circuit disagreed, finding that assignment of "payment" was sufficient to assign legal rights under an ERISA plan.

Pennsylvania Chiropractic Ass'n v. Indep. Hosp. Indem. Plan, Inc.,802 F.3d 926 (7th Cir. Oct. 1, 2015).

- Absent such an assignment of rights, practitioners likely cannot bring suit under ERISA where there is an alleged ERISA violation.
- The Pennsylvania Chiropractic Association was unsuccessful in an attempt to enforce ERISA's procedural requirements on a health insurance company because its patients had not assigned their legal or monetary rights over to the providers.

Pennsylvania Chiropractic Ass'n v. Indep. Hosp. Indem. Plan, Inc.,802 F.3d 926 (7th Cir. Oct. 1, 2015).

- Additionally, the court found no ERISA coverage in this case because the legal issue had nothing to do with employee benefit plans, but rather with the contractual arrangement between the health insurer and the providers.
  - These contracts, the court pointed out, had nothing to do with particular plans, whether employer-sponsored or not.

Pennsylvania Chiropractic Ass'n v. Indep. Hosp. Indem. Plan, Inc.,802 F.3d 926 (7th Cir. Oct. 1, 2015).

- Be aware that many courts uphold these sorts of assignments of rights, which expands the pool of potential adverse parties in litigation.
- Providers are also often better able to afford taking legal action than individual claimants, and can do so on a larger scale by suing on behalf of entire groups of individual claimants.

Michels Corp. v. Cent. States, Se., & Sw. Areas Pension Fund,800 F.3d 411 (7th Cir. Sept. 2, 2015)

- *Withdrawal liability* – employers that were all members of a trade association sponsored a multiemployer pension plan for their workers who were members of a union.
- One of the employers notified the union that it wanted to negotiate a new collective bargaining agreement, and after many months of negotiations they signed a new contract.

Michels Corp. v. Cent. States, Se., & Sw. Areas Pension Fund, cont'd.

- As of the effective date of the new contract, it was clear that the employer was no longer contractually required to contribute to the pension fund.
- However, there was a dispute over whether the employer had been required to contribute while the parties were negotiating the new contract.

Michels Corp. v. Cent. States, Se., & Sw. Areas Pension Fund, cont'd.

- During negotiations, the parties had signed temporary contract extension letters.
- The first several letters kept all of the contract terms in place. However, the last letter stated that the employer was no longer required to contribute to the pension plan fund, but that it would place what would have been owed under the contract in escrow.
- The new signed contract had no obligation to contribute to the fund, and the parties made no agreement regarding this obligation prior to the start date of the new contract, other than the last letter.

Michels Corp. v. Cent. States, Se., & Sw. Areas Pension Fund, cont'd.

- Because the fund's trust agreement required employers to contribute as provided by a collective bargaining agreement, the fund claimed that the employer's obligation to contribute from the old agreement was in effect throughout negotiations.
  - The fund argued that no true collective bargaining agreement was in place during negotiations because the extension letters were not ratified.

Michels Corp. v. Cent. States, Se., & Sw. Areas Pension Fund, cont'd.

- However, the court agreed with the employer, that the extension letters were valid, and therefore that the last letter was effective in ending the employer's obligation to contribute to the fund.
- The court noted the long-recognized principle of labor law that temporary, non-ratified extensions of collective bargaining agreements have the same force as the original agreements.

Michels Corp. v. Cent. States, Se., & Sw. Areas Pension Fund, cont'd.

- Lessons learned:
  - When signing new agreements in multiemployer arrangements, check all relevant plan documents, trust documents, and collective bargaining agreements to make sure you're complying with all of them. Terminating an obligation under one agreement may not be effective for other contractual obligations still in place.
  - Here, the employer followed all notice requirements in all of its agreements.

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago, 2016 IL 119618 (S. Ct. Ill. Mar. 24, 2016).

- Illinois Supreme Court held that a state pension reform law was unconstitutional because it violated the state constitutional right to vested pension benefits for public employees.
- This case is one of many recent cases challenging cuts to expected public pension benefits for state and municipal employees. Unlike some states, however, Illinois has constitutional protections for statutory pension rights.

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago, 2016 IL 119618 (S. Ct. Ill. Mar. 24, 2016).

- The Illinois constitution provides: "Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago, 2016 IL 119618 (S. Ct. Ill. Mar. 24, 2016).

- Facing a $20 billion pension fund deficit in the city of Chicago, the state legislature passed a law reducing pension benefits and increasing required contributions by both employees and public employers. Union representatives were involved in drafting the law, and the vast majority of them supported it.

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago, 2016 IL 119618 (S. Ct. Ill. Mar. 24, 2016).

- Union members participating in two affected pension funds sued the funds, arguing the new law was unconstitutional. The city of Chicago intervened to defend the law.
- In effect, the Illinois constitutional pension protection clause creates vested, irrevocable benefits for employees and retirees once state law establishes those benefits.

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago, 2016 IL 119618 (S. Ct. Ill. Mar. 24, 2016).

- The Illinois Supreme Court agreed with the pensioners. The Court rejected the City's argument that the pensioners "benefited" from the new law by avoiding the pension funds' insolvency. The "benefits" protected, the Court held, were the annuity amounts to be received, with no regard to how the employers funded the plans, and so could not be reduced through legislation.

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago, 2016 IL 119618 (S. Ct. Ill. Mar. 24, 2016).

- Notably, the Court found the unions did not ratify the changes contained in the new law by their participation in drafting proposed language to the legislature. Unions, the Court held, could only waive constitutional pension rights for their members through the collective bargaining process. Here, no such process occurred.

Questions?

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